In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 9–13) is reported at 481 F. 2d 613. The initial opinion of the district court (App. C, *infra*, pp. 15–18) and its opinion on rehearing (App. D, *infra*, pp. 19–22) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 14) was entered July 19, 1973. The juris-

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diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether sale and transfer of marijuana by an Army officer to an Army enlisted man off post and possession of marijuana by the officer off post are "service-connected" offenses under *O'Callahan* v. *Parker*, 395 U.S. 258, so as to be within the military court-martial jurisdiction.

STATEMENT

The relevant facts have been stipulated (App. E, *infra*, pp. 23–25), and are set forth in the opinion of the court of appeals (App. A, pp. 9–11). Captain Councilman is an Army officer serving on active duty at Fort Sill, Oklahoma (App. E, p. 23). After receiving information from a confidential informant that Councilman was using marijuana at his off-post apartment in Lawton, Oklahoma, the Army's Criminal Investigation Detachment investigated by introducing Councilman to an enlisted undercover agent at an off-post party (App. A, p. 10). The agent, who had participated in numerous other investigations, represented himself to be an enlisted Army clerk at Fort Sill (App. A, pp. 10–11). Thereafter, it is alleged that Councilman transfered marijuana to the undercover agent on two occasions on March 15, 1972, in Lawton, Oklahoma, once by gift and once by sale (App. E, p. 23). At the time of the alleged offenses, Councilman was off post, off duty, and not in uniform (App. E, p. 24). He was then apprehended by civilian authorities. A search of his apartment on March 18, 1972,

revealed additional marijuana (App. A, p. 11). Councilman was taken into civilian custody and later remanded to the military authorities. He was charged with wrongful sale, transfer, and possession of marijuana in violation of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934 (App. E, pp. 23–24). At a hearing preceding court-martial, Councilman argued that the military authorities lacked jurisdiction because his offenses were not service-connected, but the presiding military judge rejected this argument (App. E, p. 24).

Councilman then brought this action against the Secretary of Defense, the Secretary of the Army, and the Commanding General and Staff Judge Advocate of Fort Sill, seeking to enjoin his impending court-martial. The district court held the three alleged offenses were not service-connected and permanently enjoined further court-martial proceedings against Councilman on the three charges (App. C, pp. 15–18). The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. There is a conflict between the civilian courts of appeals and the Court of Military Appeals on the issue whether drug and marijuana offenses by servicemen are service-connected under *O'Callahan* v. *Parker*, 395 U.S. 258, and *Relford* v. *Commandant*, 401 U.S. 355, when the offenses occur outside the boundaries of a military post.

The main burden of applying the "service-connection" test has been borne by the Court of Military Appeals, "the court to which Congress has confided

primary responsibility for the supervision of military justice in this country and abroad." *Noyd* v. *Bond*, 395 U.S. 683, 695. Soon after *O'Callahan* was decided, the Court of Military Appeals stated that "use of marijuana and narcotics by military persons on or off a military base has special military significance" in light of the "'disastrous effects'" of these substances "'on the health, morale and fitness for duty of persons in the armed forces.'" *United States* v. *Beeker*, 18 U.S.C.M.A. 563, 565, 40 C.M.R. 275, 277. There, use of marijuana either on or off post and possession of marijuana on post were held service-connected. In later cases, the highest military court held that off-post possession of marijuana or illegal narcotics was also service-connected. *United States* v. *Castro*, 18 U.S.C.M.A. 598, 40 C.M.R. 310; *United States* v. *Adams*, 19 U.S.C.M.A. 75, 41 C.M.R. 75. Finally, in *United States* v. *Rose*, 19 U.S.C.M.A. 3, 41 C.M.R. 3, unlawful sale of barbiturates off post by one serviceman to another was held service-connected.[1]

In contrast to these decisions, a number of civilian courts have held that various off-post drug offenses

[1] On the other hand, in *United States* v. *Morley*, 20 U.S.C.M.A. 179, 43 C.M.R. 19, sales of marijuana and LSD off post *to a civilian* were held not service-connected. Also, wrongful possession of narcotics paraphernalia (a hypodermic syringe) off post was held not service-connected by the Court of Military Appeals because possession of narcotics instruments does not have "the same kind of direct and immediate effect upon the health, morale, and good order and discipline" as possession of drugs. *United States* v. *Teasley*, 22 U.S.C.M.A. 131, 132, 46 C.M.R. 131.

are not service-connected. In addition to the Tenth Circuit's decision in the present case, the Fifth Circuit has held that use of marijuana by a serviceman off post and off duty is not service-connected. *Cole* v. *Laird*, 468 F. 2d 829 (C.A. 5).[2] Other decisions by district courts have also held that the military lacks jurisdiction over off-post drug offenses. *E.g.*, *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.); *Lyle* v. *Kincaid*, 344 F. Supp. 223 (M.D. Fla.); *Schroth* v. *Warner*, 353 F. Supp. 1032 (D. Hawaii); *Redmond* v. *Warner*, 355 F. Supp. 812 (D. Hawaii). Contra, *Scott* v. *Schlesinger*, No. C.A. 4-2371 (N.D. Tex., Oct. 1, 1973) (off-post sales of marijuana and LSD to servicemen held service-connected). The conflict between these decisions and the decisions of the Court of Military Appeals is continuing and creates much divisive litigation. It can only be resolved by this Court.

2. The issue presented is important, and, in our view, was wrongly decided below. Off-post narcotics and marijuana offenses constitute one of the largest categories of off-post offenses by servicemen over which the military has exercised jurisdiction. In 1967, the Army assumed jurisdiction over 106 such offenses. *Relford* v. *Commandant*, 401 U.S. 355, 370 n. 14. Because of the large number of these cases, the issue regarding the constitutional limitations upon the mili-

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[2] Compare, *Diorio* v. *McBride*, 431 F. 2d 730 (C.A. 5) (on-post use and possession of marijuana held service-connected).

tary's jurisdiction to try such offenses should be promptly and authoritatively resolved.

In holding that the off-post possession, transfer and sale of marijuana by an officer to an enlisted man is not service-connected, the court below improperly applied the criteria set forth in *Relford* v. *Commandant*, 401 U.S. 355, 367–369. The nine factors which this Court stressed in determining service-connection recognize the military's interest in maintaining order and discipline (see factors (b) and (c)). Illegal trafficking in prohibited drugs by servicemen constitutes a serious threat to military order and discipline, as the Court of Military Appeals has held.

The threat to military discipline and authority is especially acute where, as here, an officer is involved in illegal drug transactions with an enlisted man. *Relford* also acknowledged that the military's power to try and punish offenses extends "beyond the purely military offense," particularly in areas where civilian courts may "have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community." 401 U.S. at 367–368 (factors (d) and (e)). Here, both participants in the alleged offense were military personnel and the offense had little direct impact upon the civilian community. Thus, local civilian authorities may not fully vindicate the military's special interests in deterring drug abuse. The court below has therefore misapplied the standards set forth in *Relford* in concluding that Councilman's alleged offenses are not service-connected.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

MORTON HOLLANDER,
ANTHONY J. STEINMEYER,
Attorneys.

OCTOBER 1973.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 72–1812

(Filed July 19, 1973)

BRUCE R. COUNCILMAN, APPELLEE

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL., APPELLANTS

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 72–462)

Anthony J. Steinmeyer, Attorney, Department of Justice (*Harlington Wood, Jr.,* Assistant Attorney General, *William R. Burkett,* United States Attorney, *Walter H. Fleischer* and *Michael H. Stein,* Attorneys, Department of Justice, with him on the Brief) for appellants.

Nicholas D. Garrett and *Orin Christopher Meyers,* Lawton, Oklahoma, for appellee.

Before SETH, HOLLOWAY, and MCWILLIAMS, Circuit Judges

SETH, *Circuit Judge.*

Appellants, defendants below, appeal from an order of the United States District Court for the Western District of Oklahoma, permanently enjoining the de-

523-971—73——2

fendants from continuing with court-martial proceedings against appellee.

As a basis of its order, the trial court found that the offenses with which appellee was charged by the military were not "service connected" within the meaning of that term as developed in the decisions of the Supreme Court of the United States in *O'Callahan* v. *Parker*, 395 U.S. 258, and *Relford* v. *Commandant*, 401 U.S. 355.

Appellee Councilman, a Captain in the United States Army stationed at Fort Sill, Oklahoma, was charged under the Uniform Code of Military Justice with the wrongful sale and transfer of marijuana to an enlisted man, Army Specialist Four Glenn D. Skaggs. He was also charged with the wrongful possession of marijuana which took place on another occasion. Although Captain Councilman was charged under Article 134, the general article, the constitutionality of which has been questioned, see *Avrech* v. *Secretary of the Navy*, 41 U.S.L.W. 2497 (D.C. Cir. March 20, 1973); *Levy* v. *Parker*, 41 U.S.L.W. 2597 (3d Cir. April 18, 1973); that issue is not presented to us, and it is unnecessary to decide it in the context of this case.

Councilman sought to have the court-martial proceedings dismissed for lack of jurisdiction, but his motion was denied by the presiding judge of the court-martial. This suit was then commenced.

The facts, which are not in dispute, are as follows: The Army authorities were advised by a confidential informant that Councilman was using marijuana in his off-post apartment. Thereafter, at a party to which he was invited for that purpose, Captain Councilman was introduced to an undercover agent of the Army's Criminal Investigation Division, Specialist Four Glenn D. Skaggs. Skaggs was using the name Danny

Drees, and was introduced to Councilman as an Army clerk-typist, also stationed at Fort Sill. Thereafter it is alleged that Councilman on one occasion transferred, and on another sold, small amounts of marijuana to Skaggs, alias Drees.

Based on Skaggs' investigation, Councilman was apprehended by civilian authorities, and a search of his apartment turned up a small quantity of marijuana. Skaggs from time to time also acted on behalf of the civilian authorities. Councilman was subsequently turned over to military authorities, and the court-martial proceedings here in issue were commenced. During all times relevant to the issues in this case, it is stipulated that Councilman was off-post, off-duty, and out of uniform, and that Skaggs was off-post and out of uniform, and although ostensibly off-duty, was in fact on duty in his capacity as an undercover agent.

In *Relford* v. *Commandant*, 401 U.S. 355, referred to by the trial court, the Supreme Court set forth twelve tests which it considered to be implicit from the holding in *O'Callahan* v. *Parker*, 395 U.S. 258. These standards are to be used in determining if offenses are "service connected." A review of the facts in the present case in the light of *Relford* reveals that only one of the standards or factors need be here considered. This one concerns whether the "victim" is engaged in a duty relating to the military. As to this element, we do not consider that Skaggs, alias Drees, was a "victim" in the ordinary sense. Also if the time of the offense is considered, Skaggs was not then engaged outwardly in the performance of any duty relating to the military. The opinion in *Relford* does not indicate that the Supreme Court had in mind this type of situation when it referred to a person performing military duties or to a "victim." The

Relford Court also added nine other factors that should be taken into consideration in arriving at a determination of whether a crime is sufficiently "service connected" so as to confer jurisdiction on a military court. These factors are enumerated at 401 U.S. 367, 369. As to these factors, the Government argues that because the alleged sale and transfer of marijuana was between two servicemen, and particularly here between an officer and an enlisted man, they have shown sufficient "service connection" to enable the military courts to assume jurisdiction over appellee. Of the nine factors, only one might be present here. This factor relates to the rank of the persons involved in the incident or the fact that both were servicemen.

It has been held that the off-base possession of marijuana by a serviceman is not "service connected." *Moylan* v. *Laird,* 305 F. Supp. 551 (D.R.I.). Neither is off-base use of marijuana. *Cole* v. *Laird,* 468 F. 2d 829 (5th Cir.). Nor is the off-base sale by a serviceman to a civilian. *United States* v. *Morley,* 20 USCMA 179. It has also been held that there is no "service connection" when a serviceman commits an off-duty, off-base, out of uniform offense against the dependents of another serviceman, *United States* v. *Henderson,* 18 USCMA 601, although the Court of Military Appeals has held that any offense by one serviceman against another, even if committed off-base, off-duty, and while the offender is in civilian

attire and unaware that his victim is the person or property of another serviceman, is sufficiently "service connected" to confer court-martial jurisdiction. *United States* v. *Camacho,* 19 USCMA 11.

We cannot agree that this sale or transfer of marijuana, as we previously said, involved any "victim," and it appears that "service connection" based on this theory is so remote as to be not at all within the meaning of that term as used by the Supreme Court in *O'Callahan* and *Relford.* See *United States* v. *Cook,* 19 USCMA 13; *Silvero* v. *Chief of Naval Air Basic Training,* 428 F. 2d 1009 (5th Cir.).

The requirement of indictment by a grand jury and the right to a jury trial are not forfeited by a person simply because he chooses, or is in some cases required, to serve his country as a member of the Armed Forces. These rights should be preserved to a serviceman insofar as possible without interfering with military discipline. In the instant case, there is no military connection with the crime other than the fact that Councilman and Skaggs were members of the Armed Forces. The commission of the crimes that appellee stands accused of affects military discipline no more than commission of any crime by any serviceman.

The trial court was correct in its determination that the military was without jurisdiction to proceed with the court-martial of Captain Councilman and in issuing the injunction.

Affirmed.

APPENDIX B

JULY TERM—JULY 19, 1973

No. 72-1812

BRUCE R. COUNCILMAN, PLAINTIFF-APPELLEE

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FT. SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FT. SILL, OKLAHOMA, DEFENDANTS-APPELLANTS

Before Honorable OLIVER SETH, Honorable WILLIAM J. HOLLOWAY, JR. and Honorable ROBERT H. MCWILLIAMS, Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

On consideration whereof, it is ordered that the judgment of said court is *affirmed*.

HOWARD K. PHILLIPS,
Clerk.

By
(S) LAVON M. ISLBERK,
Deputy Clerk.

APPENDIX C

In the United States District Court for the Western District of Oklahoma

Civil No. 72–462

(Filed July 7, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FT. SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FT. SILL, OKLAHOMA, DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled case came on regularly for hearing before the Honorable Stephen S. Chandler, United States District Judge, the plaintiff, Bruce R. Councilman, appearing in person and by Nicholas D. Garrett and W. W. Godlove, and the defendants appearing by O. B. Johnston III, Assistant United States Attorney for the Western District of Oklahoma, Captain Charles W. Turnbaugh and Captain Perry M. Raymond, both of the Judge Advocate General Corps; and the parties having stipulated as to certain facts hereinafter enumerated, and each having submitted briefs, announced ready for the hearing, and the Court, being fully advised in the premises, finds:

STIPULATION OF FACTS

It was stipulated that Bruce R. Councilman, plaintiff in said cause, is a Captain on active duty in the United States Army and stationed at Ft. Sill, Oklahoma; that plaintiff is presently charged before an Army court-martial with three offenses under the Uniform Code of Military Justice, said offenses being:

1. Wrongful sale of marijuana to Specialist–4, Glenn D. Skaggs in Lawton, Oklahoma, on March 15, 1972, at 10:30 p.m.

2. Transfer of marijuana to Specialist–4, Glenn D Skaggs in Lawton, Oklahoma, on March 15, 1972, at 1:15 a.m.

3. Wrongful possession of marijuana at his apartment in Lawton, Oklahoma, on March 18, 1972.

It was further stipulated that the alleged offenses occurred in the civilian community of Lawton, Oklahoma, while plaintiff was off duty and out of uniform. Immediately following the search of his apartment in Lawton, Oklahoma, plaintiff was taken by the civilian and military authorities to the Lawton Police Department, where he was booked and later removed to Ft. Sill, Oklahoma.

That at all times the civilian courts were open for any one or more of the above charges to be filed.

The Court, for the purpose of this hearing, accepted as true the stipulation that Investigator Skaggs and Investigator Nelson, a CID agent, would testify that Skaggs was introduced to plaintiff, Bruce R. Councilman, in the apartment of Investigator Nelson, who had invited Bruce R. Councilman to attend, and at that time, according to the offered testimony of the defendants, Investigator Nelson introduced Investigator Skaggs as being a man by the name of Danny

Drees, a Specialist–4 Clerk in the Army training center at Ft. Sill, Oklahoma.

That Investigator Skaggs carried on his investigation of Bruce R. Councilman between the dates of March 10 and March 18, 1972. That at all times in his dealings with plaintiff herein, he was in civilian clothes, used the alias of Danny Drees, held himself out as a user of and dealer in marijuana.

That at all times subsequent thereto, Skaggs was used as an undercover agent in which numerous cases were filed by virtue of his activities involving both civilian and military personnel and that many of the military offenders apprehended for drug sales and transfers to Skaggs which occurred in the civilian community have been tried by civilian authorities, but that some have been tried by the military authorities.

That Motions were filed and presented to the presiding military judge of the court-martial proceedings to dismiss the charges against plaintiff because of the lack of jurisdiction of the military to try him in a court-martial proceeding, briefs were filed, evidence heard, and the Motion denied, and that the Court-martial proceeding was set for trial to begin at 9:00 a.m. on July 11, 1972.

CONCLUSIONS OF LAW

The Court, after having examined the Stipulation of Facts, together with oral stipulations above-referred to and having heard arguments of counsel, is of the opinion that the defendants, and each of them, lack jurisdiction to try the plaintiff for the above offenses. *James F. O'Callahan* v. *J. J. Parker,* 395 U.S. 258, 23 L.Ed. 291, 89 S. Ct. 1683 (1969); *Isiah Relford* v. *Commandant, U.S. Disciplinary Barracks,* 401 U.S.

355, 28 L.Ed. 2nd 102, 91 S. Ct. 649 (1971); *Moylan* v. *Laird*, 305 F. Supp. 551 (1969).

JUDGMENT

IT IS THEREFORE ORDERED AND DECREED that the defendants, and each of them, be and they are hereby permanently enjoined from proceeding further with the court-martial proceedings against plaintiff on the three above-named charges and specifications.

(S) Stephen S. Chandler,
STEPHEN S. CHANDLER,
United States District Judge.

Approved:

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,

(S) W. W. Godlove
W. W. GODLOVE,
Attorneys for Plaintiff,

(S) O. B. Johnston III
O. B. JOHNSTON III,
Assistant U.S. Attorney,

(S) Charles W. Turnbaugh
CAPT. CHARLES W. TURNBAUGH, JAGC

APPENDIX D

In the United States District Court for the Western District of Oklahoma

No. Civ-72-462

(Filed August 7, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

MEMORANDUM OPINION AND ORDER OVERRULING PETITION FOR RECONSIDERATION

On this 3rd day of August, 1972, upon consideration of Petition for Reconsideration with brief attached, the Court finds that on July 5, 1972, the plaintiff filed in this Court (1) Motion for Temporary Restraining Order praying for a temporary restraining order restraining defendants from subjecting the plaintiff to court-martial proceedings scheduled for July 11, 1972, upon the ground that immediate and irreparable injury, loss and damage would result; (2) Motion for Preliminary Injunction; (3) Affidavit in Support of Motion for Temporary Restraining Order; and (4) Briefs in support of the foregoing motions.

Upon presentation of said papers to the undersigned Judge of said Court, an *ex parte* temporary restraining order was denied and the defendants were notified by telephone and agreed to be present the following day at 10:00 o'clock a.m. for a hearing of the Motion for Preliminary Injunction, at which time the parties appeared and the attorneys for the defendants filed Brief in Opposition to the granting of the relief prayed for by the plaintiff.

The Court, having considered the Agreed Statement of Facts, arguments and admissions of counsel, entered findings of fact, conclusions of law and Judgment enjoining the defendants from proceeding further with the court-martial proceedings against plaintiff on the charges and specifications described in the findings of fact. The matter is now before the Court on the defendants' Petition for Reconsideration.

The Court is of the opinion that the four instruments denominated Motion for Temporary Restraining Order, Motion for Preliminary Injunction, Affidavit in Support of Motion for Temporary Restraining Order and Brief filed in support thereof, which were simultaneously filed by the plaintiff on the 5th day of July, 1972, in view of Rule 8(e), meet the requirements of a Complaint as contemplated by Rule 3, FRCP. As authorized by Rule 8(f) in order to do substantial justice, said instruments were considered by the Court as fully complying with Rule 3(a), FRCP. Had objection been raised by defendants at the hearing, said pleadings would have been conformed to the Rules and such an order is hereby entered *Nunc Pro Tunc* as authorized by Rule 15(b) FRCP.

The pleadings filed by the plaintiff fully apprised the defendants of the nature of the relief sought, were served on the defendants' counsel on the date filed, a

day prior to the hearing. The record shows that the defendants were quite familiar with the facts involved regarding which there was no controversy and that defendants were represented by Captain Charles W. Turnbaugh and Captain Perry M. Raymond of the Judge Advocate General Corps, and O. B. Johnston III, Assistant United States Attorney for the Western District of Oklahoma, who announced ready for the hearing, filed written brief and lucidly and skillfully presented the factual and legal propositions involved.

While the Court did not at the time specifically reform the pleadings by changing the titles thereof, they were considered by the Court and counsel for the parties as adequate although not denominated "Complaint". The facts involved and the relief sought were just as clear from the four-corners of the four instruments filed by the plaintiff as if they had been denominated "Complaint", and just as clearly invoked the jurisdiction of the Court and the Court coming to the conclusion that under the law it was necessary for him to enter an injunction against the defendants to prevent irreparable damage to the plaintiff, entered and filed forthwith an Order enjoining the defendants from proceeding further with the court-martial proceedings.

As to the contention of the defendants that plaintiff did not request a permanent injunction and that the Court granted a permanent injunction *sua sponte*, the Court is of the opinion that while the word "permanent" may be superfluous, as a matter of law it simply means that the injunction is permanent until set aside by an appellate court, and signifies that there would be no purpose in entering a Temporary Order since all of the facts involved were before the Court

and it would be useless to grant a Temporary Injunction and set the matter for further hearing on whether or not a Permanent Injunction should be entered, since no good purpose could be served thereby.

The Court sought to effect a just and speedy determination of the action which resulted in a simple, short and inexpensive record for appeal if the defendants wish to apply to an appellate court for relief from the entry of the extraordinary writ of prohibition, all in accordance with the mandate of Rule 1, FRCP.

The Petition for Reconsideration is therefore overruled.

(S) STEPHEN S. CHANDLER,
United States District Judge.

APPENDIX E

In the United States District Court for the Western District of Oklahoma

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No. Civ–72–462

(Filed July 6, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. McCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

STIPULATION OF FACT

It is hereby stipulated by and between the plaintiff and the defendents that the following are true:

Bruce R. Councilman, plaintiff, is a captain on active duty in the US Army and stationed at Fort Sill, Oklahoma. The plaintiff is charged before an Army court-martial with three offenses under the Uniform Code of Military Justice:

(1) Wrongful sale of marihuana to Specialist Four Glenn D. Skaggs in Lawton, Oklahoma, at 10:30 p.m., 15 March 1972;

(2) Wrongful transfer of marihuana to Specialist Four Glenn D. Skaggs at 1:15 a.m., 15 March 1972, in Lawton, Oklahoma; and,

(3) Wrongful possession of marihuana at his apartment in Lawton, Oklahoma, on 18 March 1972.

The alleged offenses occurred in the civilian community of Lawton, Oklahoma, while the plaintiff was off duty and out of uniform.

From 10 March until 18 March 1972, Investigator Skaggs was acting as an undercover agent investigating the plaintiff and others and used the alias of Danny Drees. Skaggs has acted as an undercover agent in numerous cases involving both civilians and military personnel. Many of the military offenders apprehended for drug sales and transfers to Skaggs in the civilian community have been tried by the civilian authorities but some have been tried by the military authorities.

A motion was made to the presiding military judge to dismiss the charges against the plaintiff because of lack of jurisdiction. Briefs were accepted, evidence heard and the motion was denied. Trial on the merits is scheduled for 9:00 a.m., 11 July 1972.

Respectfully submitted.

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,
Attorney for Plaintiff,

(S) Bruce R. Councilman.

(S) O. B. Johnston
O. B. JOHNSTON,
Assistant U.S. Attorney for United States.

(S) Charles W. Turnbaugh
CHARLES W. TURNBAUGH, CPT., JAGC,
Attorney for United States, Defendant.

In the United States District Court for the Western District of Oklahoma

No. Civ–72–462

(Filed July 6, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

STIPULATION OF EXPECTED TESTIMONY

If US Army Criminal Investigator James Nelson and US Army Military Police Investigator Glenn D. Skaggs were present in court and sworn as witnesses, they would testify substantially as follows:

On 10 March 1972, Investigator Nelson, as part of a criminal investigation, held a party in Lawton, Oklahoma at which Investigator Skaggs and the plaintiff were present. Investigator Skaggs was introduced to the plaintiff by Nelson as Danny Drees, a Specialist Four clerk in the Army Training Center at Fort Sill, Oklahoma.

(S) Charles W. Turnbaugh
CHARLES W. TURNBAUGH,
Captain, JAGC,
Trial Counsel.

(S) Bruce R. Councilman
BRUCE R. COUNCILMAN,
Accused.

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,
Attorney for Plaintiff.

U.S. GOVERNMENT PRINTING OFFICE 1973

INDEX

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Summary of argument	5
Argument:	
The district court improperly enjoined the court-martial proceeding	6
A. Civilian courts have jurisdiction to review court-martial proceedings involving military personnel only by writ of *habeas corpus*	6
B. The district court's action was an improper interference with a pending court-martial proceeding	9
C. The district court should have dismissed the suit because respondent had not exhausted his remedies within the military system	18
Conclusion	20

CITATIONS

Cases:	
Burns v. *Wilson*, 346 U.S. 137	12
Cole v. *Laird*, 468 F. 2d 829	17
Dombrowski v. *Pfister*, 380 U.S. 479	9
Dooley v. *Ploger*, No. 73-1900, decided February 12, 1974 (C.A. 4)	9, 13-14, 17
Douglas v. *City of Jeannette*, 319 U.S. 157	11
Fein v. *Selective Service System*, 405 U.S. 365	17
Fenner v. *Boykin*, 271 U.S. 240	11
Gilligan v. *Morgan*, 413 U.S. 1	9
Gosa v. *Mayden*, 413 U.S. 665	17
Gusik v. *Schilder*, 340 U.S. 128	10, 11, 13, 17, 18
Hemphill v. *Moseley*, 443 F. 2d 322	17
Hensley v. *Municipal Court*, 411 U.S. 345	9

Cases—Continued Page
Johnson v. *Hoy*, 227 U.S. 245 9
Levy v. *Corcoran*, 389 F. 2d 929, certiorari denied, 389 U.S. 960 ..... 10, 16
Mascarage v. *Schlesinger*, No. 73–1446, decided March 1, 1974 (C.A.D.C.) 17
McElroy v. *Guagliardo*, 361 U.S. 281 14
McKart v. *United States*, 395 U.S. 185 15
McLucas v. *DeChamplain*, No. 1863–73, decided November 13, 1973 (D. D.C.), pending on appeal to this Court, No.73–1346 9
Moylan v. *Laird*, 305 F. Supp. 551 9
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 .. 6, 16, 19
National Labor Relations Board v. *Hearst Publications* 322 U.S. 111 16
Noyd v. *Bond*, 395 U.S. 683 ..... 7, 10, 12, 13, 14, 16, 18, 19
O'Callahan v. *Parker*, 395 U.S. 258 ..... 4, 11, 13, 14, 15, 17
Orloff v. *Willoughby*, 345 P.S. 83 9
O'Shea v. *Littleton*, No. 72–953, decided January 15, 1974 ..... 9, 11
Parisi v. *Davidson*, 405 U.S. 34 ..... 5, 12, 13
Preiser v. *Rodriguez*, 411 U.S. 475 9
Relford v. *United States Disciplinary Commandant* 401 U.S. 355 ..... 4, 19
Sedivy v. *Richardson*, 485 F. 2d 1115 petition for certiorari pending, No. 73–6030 ..... 9, 10, 12, 17
United States v. *Beeker*, 18 U.S.C.M.A. 563, 40 C.M.R. 275 19
United States v. *Tucker Truck Lines*, 344 U.S. 33 19
Younger v. *Harris*, 401 U.S. 37 ..... 5, 9, 10, 11

Constitution and statutes:
United States Constitution:
Art. I, § 8, cl. 14 12
Art. I, § 9 5
Art. I, § 9, cl. 2 7

Constitutions and statutes—Continued	Page
Uniform Code of Military Justice:	
Article 32, 10 U.S.C. 832	3, 13
Article 39(a), 10 U.S.C. 839(a)	3, 13
Article 61, 10 U.S.C. 861	18
Article 64–69, 10 U.S.C. 864–869	7
Article 64, 10 U.S.C. 864	18
Article 66, 10 U.S.C. 866	13, 18
Article 67, 10 U.S.C. 867	13, 18
Article 76, 10 U.S.C. 876	5, 6, 7
Article 134, 10 U.S.C. 934	3
28 U.S.C. 2254(c)	11
All Writs Act, 28 U.S.C. 1651(a)	19
Miscellaneous:	
H. Rep. No. 491, 81st Cong., 1st Sess.	7
S. Rep. No. 486, 81st Cong., 1st Sess.	7
Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan* v. *Parker*, 54 Minn. L. Rev. 1 (1969)	16

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-662

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS ON THE JURISDICTIONAL ISSUES

This Brief is filed pursuant to the Court's request of April 2, 1974, that supplemental briefs be filed "on the issues of (1) the jurisdiction of the District Court, (2) exhaustion of remedies, and (3) the propriety of a federal district court enjoining a pending court-martial proceeding."

The petitioners have not yet filed their brief on the merits. Since we believe, for the reasons set forth below, that the district court should not have entertained this suit, this brief discusses only the foregoing issues. If the Court does not dispose of this case this Term, however, we shall then promptly file our brief on the merits.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 9–13) is reported at 481 F.2d 613. The initial opinion of the district court (Pet. App. C, pp. 15–18) and its opinion on rehearing (Pet. App. D, pp. 19–22) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 14) was entered on July 19, 1973. The petition for a writ of certiorari was filed on October 16, 1973, and was granted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The relevant facts have been stipulated (Pet. App. E, pp. 23–25) and are set forth in the opinion of the court of appeals (Pet. App. A, pp. 9–11). Captain Councilman is an Army officer serving on active duty at Fort Sill, Oklahoma (Pet. App. E, p. 23). After receiving information from a confidential informant that Councilman was using marihuana at his off-post apartment in Lawton, Oklahoma, the Army's Criminal Investigation Detachment ("CID") began an investigation by introducing Councilman at an off-post party to Specialist Four Glenn D. Skaggs, an enlisted man who was an undercover agent for the CID (Pet. App. A, p. 10; Pet. App. E, p. 25).

Skaggs, who had participated in numerous drug investigations, was then using the name Danny Drees and was introduced to Captain Councilman as a clerk-typist in the Army Training Center at Fort Sill (Pet. App. A, pp. 10–11; Pet. App. E, p. 25). Shortly

thereafter, Councilman allegedly transferred small amounts of marihuana to Skaggs on two separate occasions, once by gift and once by sale (Pet. App. E, p. 23). At the time of the offense, Councilman was off post, off duty, and not in uniform (Pet. App. E, p. 24); Skaggs also was not in uniform and ostensibly was off duty (Pet. App. A, p. 11). Councilman was apprehended by civilian authorities, and a search of his off-post apartment revealed additional marihuana (Pet. App. A, p. 11). He was taken into civilian custody, and later remanded to the military authorities.

On March 27, 1972, court-martial charges were preferred against Councilman, alleging that he violated Article 134 of the Uniform Code of Military Justice[1] by wrongfully selling, transferring and possessing marihuana.[2] Following an investigatory hearing conducted pursuant to Article 32 of the Uniform Code, 10 U.S.C. 832, these charges were referred to a general court-martial for trial. (Pet. App. E, pp. 23–24).

At a preliminary hearing held on June 27, 1972, pursuant to Article 39(a), 10 U.S.C. 839(a), Councilman moved to dismiss the charges on the ground that the military authorities lacked jurisdiction because his offenses were not "service connected" under

[1] That Article, 10 U.S.C. 934, prohibits, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces." The constitutionality of this provision is pending before the Court in *Secretary of the Navy* v. *Avrech*, No. 72-1713, and *Parker* v. *Levy*, No. 73-206, argued on February 20, 1974.

[2] There was also a charge of wrongful use of marihuana, which was dismissed after the pre-trial investigation (Pet. App. E, pp. 23–24).

O'Callahan v. *Parker,* 395 U.S. 258. After an evidentiary hearing, the presiding military judge denied the motion (Pet. App. E, p. 24) and scheduled the court-martial for July 11, 1972.

On July 5, 1972, Councilman brought this action in the United States District Court for the Western District of Oklahoma to enjoin his impending court-martial.[3] He argued that, since the military courts lacked jurisdiction over the alleged offenses, he "[would] suffer great and irreparable damage in that he [might] be deprived of his liberty without due process of law, if the Court-Martial Proceedings are permitted on July 11, 1972."[4] The next day, after a hearing on the service-connection issue, the district court permanently enjoined the military authorities from proceeding with the court-martial (Pet. App. C, pp. 15–18).

The court of appeals affirmed (Pet. App. A, pp. 9–13), holding that the alleged offenses did not meet the tests for service-connection set forth in *O'Callahan* v. *Parker,* 395 U.S. 258, and elaborated in *Relford* v. *United States Disciplinary Commandant,* 401 U.S. 355. The court ruled that only one of the factors enumerated in these two opinions pointed to "service-connection" in this case—the "factor relat[ing] to the rank of the persons involved in the incident or the fact that both were servicemen" (Pet. App. A, p. 12).

[3] He named as defendants the Secretary of Defense, the Secretary of the Army, and the Commanding General and Staff Judge Advocate of Fort Sill.

[4] The Affidavit in Support of Motion for Temporary Restraining Order alleged that "plaintiff herein has been arrested and placed in custody * * * pending a Court-Martial * * *."

See *Relford, supra,* 401 U.S. at 368 (factor "f"). It found this insufficient to sustain court-martial jurisdiction. The court also concluded that Captain Councilman's possession and distribution of marihuana "affect[ed] military discipline no more than commission of any crime by any serviceman" (Pet. App. A, p 13).

The jurisdictional issues discussed in this brief were not raised in or discussed by either the district court or the court of appeals.

SUMMARY OF ARGUMENT

The district court had no jurisdiction to review court-martial proceedings other than by writ of *habeas corpus.* Article 76 of the Uniform Code of Military Justice makes the actions of courts-martial conclusive upon civilian courts except insofar as the Constitution, Art. I, Sec. 9, requires the allowance of *habeas corpus.*

In any event, the District Court's enjoining of a pending prosecution in the military justice system violated established principles of law. *Younger* v. *Harris,* 401 U.S. 37. Congress has assigned responsibility for military justice in the first instance to the court-martial system, and considerations of comity require that that system be allowed to function. *Parisi* v. *Davidson,* 405 U.S. 34, 51. The special expertise of military courts in determining questions of "service-connection" should be brought to bear before civilian court review occurs. In addition, abstention from interference with ongoing prosecutions conserves scarce judicial resources, as the outcome of the military proceedings may make review unnecessary.

547-927—74——2

Finally, the accused in this case failed to exhaust any of the many remedies available to him in the military justice system. This failure also should have precluded the district court from granting relief. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51.

ARGUMENT

THE DISTRICT COURT IMPROPERLY ENJOINED THE COURT-MARTIAL PROCEEDING.

A. CIVILIAN COURTS HAVE JURISDICTION TO REVIEW COURT-MARTIAL PROCEEDINGS INVOLVING MILITARY PERSONNEL ONLY BY WRIT OF HABEAS CORPUS.

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. 876, provides that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter * * * are final and conclusive" and "all action taken pursuant to those proceedings are binding upon all * * * courts * * * of the United States * * *."[5] As argued in the government's Supplemental Brief in

[5] That Article, 10 U.S.C. 876, provides in full:

"The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

Secretary of the Navy v. *Avrech*, No. 72–1713, on which we rely here, the legislative history of Article 76 shows that Congress intended to limit civilian court review of court-martial proceedings to petitions for *habeas corpus*.[6] See, *e.g.*, S. Rep. No. 486, 81st Cong., 1st Sess., p. 32; H. Rep. No. 491, 81st Cong., 1st Sess., p. 35. In permitting *habeas corpus* as the sole exception to the finality of actions within the military court system, Congress recognized the special constitutional status of that writ under the Suspension Clause.[7] There is, of course, no corresponding constitutional basis for other remedies employed when personal liberty is not at stake (Supp. Brief in *Avrech*, pp. 5–7).

The explanation for the finality provision of Article 76 is the comprehensive appellate procedures within the military court system which the Uniform Code of Military Justice provided. See, *e.g.*, Articles 64–69, 10 U.S.C. 864–869. The ultimate responsibility for protecting the rights of accused servicemen (except for federal court review by writ of *habeas corpus*) has been placed in the Court of Military Appeals, a civilian judicial body with a specialized understanding of military problems. See *Noyd* v. *Bond*, 395 U.S. 683, 694. Below this court there are military appellate tribunals which insure that court-martial convictions of

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[6] We are serving a copy of our Supplemental Brief in *Avrech* upon counsel for respondent.

[7] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." United States Constitution, Art. I, § 9, cl. 2.

members of the Armed Forces will be fully and thoroughly reviewed.

These provisions for appellate review show that Congress intended to create an extensive and independent judicial system for the administration of military justice. Federal court review was to be allowed only to the extent that the Constitution compelled the allowance of the writ of *habeas corpus* (see Supp. Brief in *Avrech*, pp. 7–9).

Since Congress intended to preclude civilian court review of court-martial convictions except in the limited situation where *habeas corpus* is available, *a fortiori* Congress intended to preclude such review before the court-martial has even taken place. As shown below (pp. 11–17), permitting civilian court intervention in the military justice system at this preliminary stage would improperly interfere with the carefully formulated procedures Congress has selected for the conduct of the military justice system, and would also depart from a number of settled principles governing the relationship between the federal courts and other governmental agencies.[8]

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[8] Even if Councilman had sought *habeas corpus*, the writ could not have been granted because he was not "in custody." He was not incarcerated or restricted to post, nor was his liberty restrained in any way. He is presently serving in the Officer Student Battalion at Fort Sill, and has been permitted to go on leave. Although he cannot be released from active duty until the disposition of the charges against him, he has not sought such release, and we have been advised that he is a reserve officer who has volunteered to remain on duty indefinitely.

The only other disabilities that Councilman has suffered as a result of the charges against him have been that his security

B. THE DISTRICT COURT'S ACTION WAS AN IMPROPER INTERFERENCE WITH A PENDING COURT-MARTIAL PROCEEDING

1. The action of the district court was contrary to the well-established principle that federal courts will not enjoin prosecutions pending in other jurisdictions except in limited and unusual circumstances.[9] *Younger* v. *Harris*, 401 U.S. 37; *Dombrowski* v. *Pfister*, 380 U.S. 479; *O'Shea* v. *Littleton*, No. 72-953, decided January 15, 1974. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475. Although *Younger*, *Dombrowski* and *O'Shea* involved injunctions against state prosecutions, their reasoning has been correctly applied to court-martial

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clearance and "flight status" were suspended, and his records were "flagged," rendering him ineligible for favorable personnel actions, such as promotion or transfer. These conditions do not constitute a restraint upon his liberty that would place him in custody, and they could have been continued in any event, regardless of the outcome of the proceedings. Cf. *Orloff* v. *Willoughby*, 345 U.S. 83, 92-95; *Gilligan* v. *Morgan*, 413 U.S. 1, 5-12.

Councilman's status was essentially that of an indicted person at liberty awaiting trial. This status alone has never been held sufficient to support *habeas corpus* jurisdiction. See *Johnson* v. *Hoy*, 227 U.S. 245, 247; *Hensley* v. *Municipal Court*, 411 U.S. 345, 353.

[9] The present case is one of several recent cases in which district courts have enjoined pending courts-martial. *E.g.*, *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.); *McLucas* v. *DeChamplain*, D.D.C., No. 1863-73, decided November 13, 1973, pending on the government's appeal to this Court, No. 73-1346; *contra*, *Sedivy* v. *Richardson*, 485 F. 2d 1115 (C.A. 3), petition for certiorari pending, No. 73-6030; *Dooley* v. *Ploger*, C.A. 4, No. 73-1900, decided February 12, 1974.

proceedings.[10] See, *e.g.*, *Sedley* v. *Richardson*, 485 F. 2d 1115 (C.A. 3), petition for certiorari pending No. 73-6030; *Levy* v. *Corcoran*, 389 F. 2d 929 (C.A.D.C.), certiorari denied, 389 U.S. 960.

This Court's opinion in *Younger* makes clear that the irreparable harm which alone justifies federal court injunction of pending proceedings must be something more than " 'that incidental to every criminal proceeding brought lawfully and in good faith.' " 401 U.S. at 49. Councilman has never suggested that his court-martial is being brought in bad faith or for the purposes of harassment.

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[10] In *Noyd* v. *Bond*, *supra*, 395 U.S. at 693-694, the Court quoted with approval a passage from *Gusik* v. *Schilder*, 340 U.S. 128, 131-132, in which Justice Douglas, speaking for a unanimous Court, "explained some of the important reasons which require civilian courts to respect the integrity of the military court system that Congress has established":

> An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. * * * The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

Nor is there any other basis in the present case for a finding of "irreparable injury," which this Court has held must be "great and immediate" in order to justify interference with the jurisdiction of other judicial systems. See, *e.g.*, *O'Shea* v. *Littleton*, *supra*; *Fenner* v. *Boykin*, 271 U.S. 240; *Douglas* v. *City of Jeannette*, 319 U.S. 157. The fact that Councilman may have to stand trial by court-martial is not sufficient to justify injunctive relief, even though he raises claims of constitutional dimension. *Younger*, *supra*, 401 U.S. at 46, 49. Nor is he irreparably harmed because he may have to stand trial even though a federal court eventually might rule that his offense was not "service connected." Cf. *Gusik* v. *Schilder*, 340 U.S. 128. Indeed, not even the possibility of confinement while a defendant is appealing shows irreparable injury. Otherwise, the rule against injunctions of pending prosecutions would be substantially emasculated, since many defendants face the prospect of confinement if convicted. CF. 28 U.S.C. 2254(c); *Gusik*, *supra*, 340 U.S. at 129–133.

Moreover, even if Councilman's *O'Callahan* claim is rejected at all levels of military review, federal *habeas corpus* will then be available to test any jurisdictional question he presents. *Id.* at 133. Should a federal court vindicate his challenge at that time, the military charges against him would be dismissed and his conviction vacated.

2. The district court's injunction also violated the principle of comity, because it constituted an impermissible interference by a civilian court with the

military court-martial system. Whether or not Councilman's argument is termed "jurisdictional," the district court should have permitted the orderly processes of the military court system to be completed to avoid needless friction with that system and to have the facts fully developed and the law interpreted by the specialized tribunals which have been assigned the responsibility in the first instance for the administration of military justice. See *Parisi* v. *Davidson*, 405 U.S. 34, 51 (Douglas, J., concurring); *Sedivy* v. *Richardson*, 485 F. 2d 1115, 1119–1121 (C.A. 3).

Pursuant to its constitutional power "to make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, Congress has established special courts for military criminal cases. *Burns* v. *Wilson*, 346 U.S. 137. In the exercise of this power, Congress

> has never given this Court appellate jurisdiction to supervise the administration of criminal justice in the military. When after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, it deliberately chose to confide this power to a specialized Court of Military Appeals, so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces. [*Noyd* v. *Bond*, *supra*, 395 U.S. at 694.]

This precept against non-interference with the continuing proceedings of military courts applies *a fortiori* to the lower federal courts. *Sedivy* v. *Richardson*, *supra*, 485 F. 2d at 1117. As discussed earlier (pp. 6–8), the restriction of federal court review to the

constitutionally mandated writ of *habeas corpus* reflects a proper respect for the integrity of the military court system. *Noyd* v. *Bond, supra,* 395 U.S. at 693–694; *Gusik* v. *Schilder, supra,* 340 U.S. at 131–132; *Parisi* v. *Davidson,* 405 U.S. 34, 41, n. 7.

It was particularly inappropriate for the district court to have prevented the military courts from fully developing the facts relating to the exercise of their jurisdiction. Some of the facts bearing on "service connection" were presented at the Article 32 hearing, after which the charges against Councilman were referred to a general court-martial. After Councilman's challenge to court-martial jurisdiction at the Article 39(a) preliminary hearing, witnesses testified with regard to a few contested issues (such as whether or not the undercover agent who sold marihuana to Councilman held himself out as an enlisted man). But the court-martial was not allowed to develop the facts thoroughly at a plenary trial.[11] Nor was the Court of Military Review or the Court of Military Appeals allowed the opportunity to apply its expertise to the facts or to order rehearings on important evidentiary questions (Articles 66 and 67, 10 U.S.C. 866, 867).

Before deciding whether a particular crime is service-connected, the civilian courts should have the benefit of the views of the appellate military courts. As the Fourth Circuit observed in *Dooley* v. *Ploger,*

[11] The stipulation of facts in the district court (Pet. App. E, pp. 23–24), to which Councilman agreed solely for the purpose of presenting the *O'Callahan* issue, is sketchy and incomplete, and illustrates the need for civilian courts to have before them records as complete as possible before ruling on jurisdictional issues.

supra, slip op. at 20–21 (holding that military remedies must be exhausted before a federal court can hear a challenge to court-martial jurisdiction under *O'Callahan*):

> Resolution of the *O'Callahan* questions * * * depends for the most part on the fact-finding process—which will determine the circumstances under which any offense has been committed—and on a judgment of the impact of the offenses on the combat effectiveness of the armed forces. Expert understanding of the special circumstances of military life obviously would influence what facts are found from the evidence and what significance is attached to them. * * *
>
> * * * Dooley's tendered stipulation falls short of providing the certainty that is necessary in order to arrive at an informed judgment as to the effect that *O'Callahan* has on his case. The proper tribunal to determine the operative facts is a military tribunal which also has the expertise to express a view, once the operative facts are developed, of the effect of the commission of the crime, if guilt is found, on the morale and efficiency of future operations of the military. * * *

The following footnote in *Noyd* v. *Bond* has been relied upon to support the argument that jurisdictional challenges are an exception to the exhaustion requirement (395 U.S. at 696, n. 8):

> Petitioner contends that our decisions in *Toth* v. *Quarles*, 350 U.S. 11 (1955); *Reid* v. *Covert*, 345 U.S. 1 (1957); and *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960), justify his position that

> exhaustion of military remedies is not required in this case. The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected wth the military, and it is true that this Court there vindicated complainants' claims without requiring exhaustion of military remedies. We did so, however, because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. Neither of these factors is present in the case before us.

Each of the cases cited, however, involved challenges to the power of courts-martial to try civilians. That is an issue for which the military courts have no special competence and which is particularly appropriate for the civilian courts to decide. Moreover, none of those cases required a development of facts in order to determine the legal issue they presented: Whether civilians were subject to the jurisdiction of courts-martial. The resolution of that issue involved only traditional constitutional analysis and would not be aided by the application of the expertise of military courts. In the instant case, by contrast, the expertise of military courts would have been useful, indeed necessary, both for a proper development of the facts and for an informed interpretation of the record in light of *O'Callahan*. Cf. *McKart* v. *United States*,

395 U.S. 185, 197–199; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130–132.[12]

Apart from the special circumstances of those cases, ordinarily even a challenge to the jurisdiction of a tribunal does not justify an exception to the rule against federal court injunctions against the proceedings of another adjudicatory system. *Levy* v. *Corcoran*, 389 F. 2d 929, 930–931 (C.A.D.C.); cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49–52. In these circumstances, it is not surprising that several courts of appeals have rejected the contention that the footnote in *Noyd* v. *Bond* indicates that federal courts may enjoin a court-martial proceeding on the claim that the offense is not service-connected.

[12] See similarly, Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan* v. *Parker*, 54 Minn. L. Rev. 1, 50–52 (1969):

> It is submitted that, to permit a serviceman to use habeas corpus prior to exhaustion is to discount unjustifiably the availability and value of the fairly complete military appellate and collateral review procedure provided by the UCMJ. * * * The issue of "service-connection" is especially suited to the expertise of military courts and the United States Court of Military Appeals; this is not so, as Justice Harlan points out, in the purely civilian cases. By requiring exhaustion, the federal district courts, before having to tackle the question of "service-connection," will in many cases have before them expert judgment of several echelons of military tribunals and often that of the Court of Military Appeals. While such determinations are not binding on the civilian federal courts in habeas corpus actions, they nevertheless provide helpful guidelines. Moreover, such an approach will to a great extent obviate the problems inherent in interpreting "a legal tradition which is radically different from that which is common in civil courts" [citing *Noyd* v. *Bond*].

E.g., Sedivy v. *Richardson, supra; Dooley* v. *Ploger, supra; Mascavage* v. *Schlesinger,* C.A.D.C. No. 73–1446, decided March 1, 1974; contra, *Cole* v. *Laird,* 468 F. 2d 829 (C.A. 5). Cf., contra, *Hemphill* v. *Moseley,* 443 F. 2d 322 (C.A. 10).

Permitting civilian courts to enjoin pending court-martial proceedings would improperly and unnecessarily disrupt the sound functioning of the military justice system that Congress has provided for the armed services. The delays occasioned by such litigation would make trial by court-martial more difficult and perhaps impossible. If and when the court-martial finally is held, it may discover that witnesses and even military counsel are scattered to new assignments in distant places.[13]

Most importantly, such intervention by civilian courts might become unnecessary if the court-martial proceeding were permitted to follow its normal course. An acquittal at trial or a reversal at the appellate stage would eliminate the need for any civilian court review. See *Gusik* v. *Schilder, supra,* 340 U.S. at 131–132; *Gosa* v. *Mayden,* 413 U.S. 665, 711–712 (Marshall, J., dissenting). Cf. *Fein* v. *Selective Service System,* 405 U.S. 365, 376.

[13] Additionally, if federal courts can delay court-martials while conducting evidentiary hearings and appeals, the eventual military trial, if permitted, and subsequent appeals would duplicate much of the ground already covered in the federal proceedings. This repetition could be avoided by allowing full disposition of a case within the military before the *O'Callahan* issue is raised before a federal court.

C. THE DISTRICT COURT SHOULD HAVE DISMISSED THE SUIT BECAUSE RESPONDENT HAD NOT EXHAUSTED HIS REMEDIES WITHIN THE MILITARY SYSTEM.

Even if, contrary to our submission, the district court had authority to enjoin a pending court-martial on the claim that the offense was not service-connected, the court should have dismissed this suit because Councilman had not exhausted his remedies within the military justice system.

When Councilman sought relief in the district court, there were numerous remedies available to him under the Uniform Code of Military Justice through which he could have fully litigated his claims. He could have attempted to establish his innocence at a trial on the merits, at which the facts relating to both his guilt and service-connection, could have been fully developed. If he was convicted, the case would have been automatically reviewed by a staff judge advocate (Article 61, 10 U.S.C. 861) and by the convening authority (Article 64, 10 U.S.C. 864). If he was sentenced to dismissal from the service or confinement for a year or more, review on the merits and on the jurisdictional issues would then have been available from the Court of Military Review (Article 66, 10 U.S.C. 866) and, possibly, from the Court of Military Appeals (Article 67, 10 U.S.C. 867). See *Gusik* v. *Schilder,* 340 U.S. 128; *Noyd* v. *Bond,* 395 U.S. 683.

Councilman also could have sought direct relief on the jurisdictional issue from the Court of Military Appeals without going to trial on the merits. This Court

has recently noted the power of the Court of Military Appeals to grant extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a). *Noyd* v. *Bond, supra,* 395 U.S. at 695. Councilman's failure to exhaust these remedies should have precluded the district court's action, under "the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50–51. Although the holdings of the Court of Military Appeals with regard to the "service connection" of various kinds of drug offenses suggest that such a challenge to court-martial jurisdiction would probably have been unsuccessful,[14] that fact does not excuse the failure to exhaust remedies. Cf. *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37.

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[14] See, *e.g., United States* v. *Beeker,* 18 U.S.C.M.A. 563, 40 C.M.R. 275. The Court of Military Appeals, however, has always been willing to consider and adjudicate claims of lack of service-connection, as shown by the extensive list of cases in *Relford* v. *United States Disciplinary Commandant,* 401 U.S. 355, 358–359, n. 8.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be reversed and the cause remanded to the district court with directions to dismiss the complaint.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-662

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS ON THE JURISDICTIONAL ISSUES

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INDEX

Page

Statement 1

Summary of Argument 2

Argument

Proposition I — The District Court properly enjoined the Court-Martial proceeding 3

A. The District Court has jurisdiction to insure that the rights of individuals guaranteed under the U. S. Constitution are protected 3

B. In resolving a conflict between the Rights of Individuals, Guaranteed under Article III, Section 2, Cl. 3, The Sixth Amendment, and the Fifth Amendment on the one hand and Article I, Section 8, Cl. 14 on the Other, the Court should resolve the Conflict in favor of individual rights and against the expansion of Military Authority beyond its proper domain 5, 6

Proposition II — The Supreme Court should decide this case on the merits 9

Cases:

Cole v. Laird 495 F. 2d. 829 11
Moylan v. Laird 305 F. Supp. 551 10
Noyd v. Bond 395 U.S. 683 10
O'Callahan v. Parker 395 U.S. 258 ..... 2, 4, 7
Relford v. Commandant 401 U.S. 355 ..... 2, 4
Schroth v. Warner 353 F. Supp. 1032 10
Toth v. Quarles 350 U.S. 11 6
U.S. v. Beeker 40 C.R.M. 275 10
U.S. v. Rose 41 C.R.M. 3 10

Constitution and Statutes:

United States Constitution:

Article III, Section 2, Cl. 3 ..... 2, 3
Article I, Section 8, Cl. 14 2
Fifth Amendment 3
Sixth Amendment 3

Statutes:

28 U.S.C. 1331 4
10 U.S.C. 876 5

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-662

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS ON THE JURISDICTIONAL ISSUES

This Brief is filed pursuant to the Court's request of April 2, 1974, that Supplemental Briefs be filed on the issues of:

1. The Jurisdiction of the District Courts.
2. Exhaustion of remedies and,
3. The propriety of a Federal District Court enjoining a pending Court-martial proceedings.

This Brief is in response to the Brief of Petitioners herein on these issues alone.

The Court has previously granted certiorari and ordered Briefs be filed on the merits. To date, Petitioners herein have not filed a Brief on the merits.

STATEMENT

For the purpose of this Brief, Respondents concur with the statement set out in Petitioners' Brief on the Jurisdictional Issues under the headings *OPINIONS BELOW*, *JURISDICTION* and *STATEMENT*.

SUMMARY OF ARGUMENT

The case now before the Court, as did *O'Callahan v. Parker* 395 US 258, 23 L. Ed. 2nd 291 89 S. Ct. 1683 and *Relford v. Commandant* 401 US 355 28 L. Ed. 2nd 102 91 S. Ct. 649, falls within the area of stress between the Guarantees contained in Article III, Section 2, Cl. 3 of the Constitution, in the Fifth and Sixth Amendments on the one hand, and on the other, the power vested in Congress in Article I, Section 8, Cl. 14, of the Constitution "to make rules for the Government and regulation of the land and naval Forces", with its supportive necessary and proper provisions in Clause 18, and the Fifth Amendment's correlative exception for "cases arising in the land or Naval Forces".

Petitioners Brief on the Jurisdictional Issues properly and persuasively argues that when a Court Martial has jurisdiction to hear a matter coming within the purview of the Constitutionally authorized scope of Military authority, a Civilian Court does not have the power to limit or affect the mission of the Military Court and further that if a matter is properly under the authority of the Military Court, the accused should pursue his remedies in the Military Court system. We strongly disagree, however, that the case now before the Court was ever properly within the purview of the type of case which could be tried by Military Courts in the first place. We would further assert that Respondent properly applied to the District Court to claim his Constitutional right under Article III and the Fifth and Sixth Amendments. We would urge the Court that the Military does not have the power to try an individual by Court-Martial simply because the individual at the time of the alleged offense and Court-Martial was on active duty with the Army.

ARGUMENT

PROPOSITION I

THE DISTRICT COURT PROPERLY ENJOINED THE COURT MARTIAL PROCEEDING.

A. *The District Court Has Jurisdiction To Insure That The Rights Of Individuals Guaranteed Under The U.S. Constitution Are Protected.*

The U.S. Constitution, in Article III, Section 2, Cl. 3, provides that:

> "TRIAL BY JURY — The trial of all crimes, except in cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such place or places as the Congress may by Law have directed".

The Sixth Amendment provides:

> "RIGHTS OF THE ACCUSED — In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense".

The Fifth Amendment provides:

> "CRIMINAL ACTIONS — PROVISIONS CONCERNING — DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES. No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

The Respondent herein, Bruce R. Councilman, found himself in a position about to be deprived of these Constitutional rights guaranteed to all citizens. When a Plaintiff in good faith, asserts a right which is predicated upon the provisions of the Constitution, and that right may well be recognized if the Constitution is given a certain construction, then there is a substantial federal question. 1/ This general Rule applies to Rights asserted by servicemen against their superiors or against other supervisory personnel. 2/ In the instant case, there can be little doubt that respondent has asserted a most serious Constitutional claim, the resolution of which turns upon a delicate application of this Court's prior holdings in *O'Callahan vs. Parker*, and *Relford v. Commandant*, Supra.

Respondent herein bases his claim that the Federal District Court has jurisdiction under the provisions of 28 USC, Section 1331, which gives District Courts jurisdiction of all Civil actions, where the matter in controversy exceeds "$10,000.00 and arises under the Constitution, laws or treaties of the United States". Since the Respondent is claiming that the actions of the Military violate substantially his Constitutional rights

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1/ See *Martinez v. Southern Ute Tribe*, 273 F. 2d. 731, (Fifth Circuit 1960).

2/ See *Harmon v. Brucker*, 355 US 579 78 S. Ct. 433, 2L. E. 2d. 503 (1958); *Reed v. Franke*, 279 F. 2d. 17 (Fourth Cir. 1961)

as above set out, this claim clearly raises a Federal question. The Petitioner has not contested the fact that the sum of $10,000.00 was involved. Accordingly, no actual proof on this matter was submitted to the District Court. In any event, it is clear that a substantial Federal question has been raised and that the matter in controversy does exceed the value of $10,000.00. 3/

It has been asserted in Petitioner's Brief on the Jurisdictional Issues that Civilian Court have jurisdiction to review Court-martial proceedings involving Military personnel only by writ of Habeas Corpus under the provisions of Article 76 of the Uniform Code of Military Justice, 10 USC 876. We would certainly agree that Civilian Courts do have the jurisdiction to review Courts-martial by Habeas Corpus. We would disagree, however, with the statement that there is no constitutional basis for other remedies, even when the accused is not imprisoned. To so hold would be to say that a military person is deprived of the Constitutional Rights guaranteed to all citizens and must suffer military imprisonment, with its attendant scars both personal and professional, *before* the rules regarding "service connection" established by this Court may even be raised.

The crux of the matter is whether there is sufficient "service connection" in the first place. If the question be answered in the affirmative then the accused should be required to stand trial before the Military Court. If the question be answered in the negative then the Military Court has no jurisdiction to try the accused at all. Resolving this question goes to the merits of the case which we would urge this Court to consider.

B. *In Resolving A Conflict Between The Rights Of Individuals, Guaranteed Under Article III, Section 2,*

3/ Moreover, even if there be a jurisdictional amount attack we would assert that jurisdiction does lie. See *Murray v. Vaughn,* 300 F. Supp. 688 (D.R.I. 1969)

Cl. 3, The Sixth Amendment, And The Fifth Amendment On The One Hand And Article 1, Section 8, Cl. 14 On The Other, The Court Should Resolve The Conflict In Favor Of Individual Rights And Against The Expansion Of Military Authority Beyond Its Proper Domain.

The conflict between the rights of an individual under Article III of the Constitution and the Bill Of Rights on the one hand and the power of the Military deriving its authority from Article I of the Constitution on the other hand, has been considered by this Court before. The language in *Toth v. Quarles* 350 U.S. 11, 17-18, 100 L. Ed. 8, 14, 15, 76 S. Ct. 1, was quoted extensively in the O'Callahan decision, and points out some of the salient differences between military and civilian Courts:

> "We find nothing in the history of constitutional treatment of Military Tribunals which entitles them to rank along with Article III Courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike Courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to Military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in Federal Courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials.

They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

Moreover, there is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in Federal Courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury."

Determining the scope of the Constitutional power of Congress to authorize trial by Court-Martial presents another instance calling for limitation to *"the least possible power adequate to the end proposed"*. (Emphasis supplied)

Justice Douglas, delivering the opinion in O'Callahan, has further pointed out some of the differences between Courts-martial and Article III Courts:

"A Court-martial is tried, not by a Defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote. The presiding officer at a court-martial is not a judge whose objectivity and independence are pro-

tected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to elimniate the danger.

A Court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. The justification for such a system rests on the special needs of the military and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, e. g., Burns v. Wilson, 346 US 137, 97 L Ed 1508, 73 S Ct 1045, but in examining the reach of their jurisdiction, it has recognized that

'there are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free Countries of the World have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service' . . .

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law . . .

A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.

As recently stated: 'None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument discipline, not justice'. Classer, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1960).

The mere fact that Petitioner was at the time of his offense and of his court-martial on active duty in the Armed Forces does not automatically dispose of this case under our prior decisions."

PROPOSITION II

THE SUPREME COURT SHOULD DECIDE THIS CASE ON THE MERITS.

The lower Federal Courts have treated cases involving drug use by servicemen differently than have the Military Courts.

The United States Military Court of Appeals has marked several definite areas in which military jurisdiction would be maintained, O'Callahan notwithstanding. 4/ Those areas are summarized as: (1) Crimes on Base or on a Military Reservation (2) Crimes where the victim was another serviceman (3) Crimes overseas

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4/ *Wilberding, The Supreme Court Adds New Guide Lines on "Service Connection" in Determining Court Martial Jurisdiction, 1971, Washington U.L.Q. 413.*

(4) Crimes where military status was relied upon or exploited (5) narcotics or drug offenses (6) national defense matters and, (7) petty offenses. In a leading marijuana case, *U. S. vs. Beeker,* 18 U.S.C.M.A. 563, 40 CMR 275 (1969) the accused was convicted of wrongful use and possession of marijuana while off duty, and off post. Military jurisdiction was sustained by the Military Court. In *U. S. vs. Rose,* 18 U.S.C.M.A. 3, 41 CMR 3 (1969) the sale of barbiturates between servicemen while off post and off duty was held to be service connected.

The lower Federal Courts, on the other hand, have been inclined to give greater weight to the Constitutional rights of the individual, rather than to expand the power of the Military. In *Moylan v. Laird,* 305 F. Supp 551 (D.R.I. 1969) the Court held that off-base possession of marijuana was not sufficiently service connected to support military Court jurisdiction. In *Moylan,* the Court relied on the language of *Noyd v. Bond,* 395 US 683 (1969) to explain the departure from the usual exhaustion rules:

> "We did so . . . because we did not believe that the expertise of military courts extended to the consideration of Constitutional claims of the type presented. *Moreover, it appears especially unfair to require exhaustion of military remedies, when the complainants raised substantial arguments denying the right of the military to try them at all."*
> (emphasis supplied)

The same reasoning was apparent in *Schroth v. Warner,* 353 F. Supp 1032 (D. Hawaii 1973) in which the Court held that a serviceman who was charged with off-base possession of marijuana and certain drugs and off-base transfer of marijuana and on-base transfer of another controlled substance was entitled to an injunction against prosecution on such charges by Military Court-Martial.

In *Cole v. Laird*, 495 F. 2d 829 (1972) a serviceman was convicted by a Court-martial for the unlawful use of marijuana. He Petitioned the Federal Courts for injunctive relief on the ground that the Court-martial was without jurisdiction to try him for the offense. The Fifth Circuit Court of Appeals held that since the Petitioner serviceman was off-post, off-duty and in civilian clothes at the time of the alleged offense, the Constitutional requirement of "service connection" was not present and the Military had no authority to try him by Court-martial.

The Supreme Court should decide this matter on the merits and give both the Lower Federal Courts and the Military Courts direction as to the proper treatment in this area.

CONCLUSION

It is therefore respectfully submitted that the Court hear this case on the merits and that the judgment of the Court of Appeals be affirmed.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Introduction and summary of argument	2
Argument	7
I. Drug trafficking between an officer and an enlisted man is service-connected because such offenses are severely detrimental to the discipline and effectiveness of the Armed Forces of the United States	7
II. Offenses involving drug possession are service-connected because they threaten the discipline and effectiveness of the Armed Forces	11
Conclusion	19

CITATIONS

Cases:

Cole v. *Laird*, 468 F. 2d 829	14
Diorio v. *McBride*, 431 F. 2d 730	14
Dynes v. *Hoover*, 20 How. 65	13
Herrin v. *Richardson*, No. C.A. 120–73–A (E.D. Va., Oct. 17, 1973)	15
Lyle v. *Kincaid*, 344 F. Supp. 223	14
Messina v. *Commanding Officer*, 342 F. Supp 1330	14
Moylan v. *Laird*, 305 F. Supp. 551	14
Noyd v. *Bond*, 395 U.S. 683	12
O'Callahan v. *Parker*, 395 U.S. 258	2, 3, 4, 11, 14

Cases—Continued

	Page
Parker v. *Levy*, No. 73–206, decided June 19, 1974	4, 7, 10
Peterson v. *Goodwin*, No. C.A. EP–73–105 (W.D. Tex., Aug. 22, 1973)	15
Rainville v. *Lee*, 22 U.S.C.M.A. 464	18
Redmond v. *Warner*, 355 F. Supp. 812	14
Relford v. *Commandant*, 401 U.S.355	2, 3, 11, 14
Schroth v. *Warner*, 353 F. Supp. 1032	14
Scott v. Schlesinger, No. C.A. 4–2371 (N.D. Tex., Oct. 1, 1973)	15
Smith v. *Whitney*, 116 U.S. 167	13
Swain v. *United States*, 165 U.S. 553	13
United States v. *Adams*, 19 U.S.C.M.A. 75	12
United States v. *Beeker*, 18 U.S.C.M.A. 563	12
United States v. *Boyd*, 18 U.S.C.M.A. 581	12
United States v. *Castro*, 18 U.S.C.M.A. 598	12
United States v. *Cook*, 19 U.S.C.M.A. 13	13
United States v. *DeRonde*, 18 U.S.C.M.A. 575	12
United States v. *Lowe*, 4 U.S.C.M.A. 654	16
United States v. *Morley*, 20 U.S.C.M.A. 179	13
United States v. *Pieragowski*, 19 U.S.C.M.A. 508	13
United States v. *Priest*, 21 U.S.C.M.A. 564	9
United States v. *Rego*, 19 U.S.C.M.A. 9	13
United States v. *Rose*, 19 U.S.C.M.A. 3	13
United States v. *Russell*, 411 U.S. 423	19
Walden v. *McLucas*, C.A. No. 3–2892 (E.D. Cal., Dec. 21, 1973)	15
Statute:	
10 U.S.C. 934	4

Miscellaneous: Page

Department of the Army Circular 600–85.... 17

Hearings before the Subcommittee on Alcoholism and Narcotics, of the Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess.... 17

Hearing before the Subcommittee on Drug Abuse in the Military Services of the Senate Committee on Armed Services, on Review of Military Drug and Alcohol Programs, 93d Cong., 1st Sess.... 17, 18

Manual for Courts-Martial (1969).... 4

The Officer's Guide (Stackpole Press, 1968–1969 ed.).... 8

Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 187 (1962).... 14

Winthrop, *Military Law and Precedents* (2d ed., 1920 reprint).... 8, 16

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-662

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS ON THE MERITS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 9–13) is reported at 481 F.2d 613. The initial opinion of the district court (Pet. App. C, pp. 15–18) and its opinion on rehearing (Pet. App. D, pp. 19–22) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 14) was entered on July 19, 1973. The petition for a writ of certiorari was filed on October 16, 1973, and was granted on December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The relevant facts are set forth at pp. 2–5 of our Brief on the Jurisdictional Issues. They show that Councilman, a Captain in the Army, was charged with possessing marijuana at his off-base apartment and with selling marijuana to an undercover Army investigator, whom he believed to be an enlisted man from his post.

INTRODUCTION AND SUMMARY OF ARGUMENT

The sale and transfer of marijuana by an Army officer to an Army enlisted man off post and the possession of marijuana off post by the officer are offenses that are "service-connected" and hence within military court-martial jurisdiction under *O'Callahan* v. *Parker*, 395 U.S. 258. The court of appeals' ruling to the contrary rests upon a misapprehension of *O'Callahan's* rationale.

This Court, in *Relford* v. *Commandant*, 401 U.S. 355, enunciated criteria by which service-connection may be judged. The court of appeals erred in treating these factors as a complete and final codification of the *O'Callahan* rationale. Applying the criteria mechanically, without regard to other applications of their unifying theme, the court concluded that respondent Councilman was not subject to court-martial jurisdiction. We will show that the court of appeals ignored *Relford* criteria that establish court-martial jurisdiction over respondent.

More important, however, it is the rationale of *O'Callahan* that must govern this case. That rationale, and not specific applications mentioned in other cases,

gives meaning to the service-connection issue. The *Relford* opinion explicitly recognized that this Court had not attempted a closed list of criteria, that the application of the service-connection test to the facts of each case must be *ad hoc*, and, further, that the criteria mentioned do not exhaust the law's capacity for growth:

> We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O'Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time. [401 U.S. at 369.]

The term "service-connection" itself implies the "area * * * where the court-martial is appropriate and permissible." This area is defined by the need of the military, recognized by the Constitution, for a justice system that reinforces the discipline and morale required in an effective fighting force. As the *O'Callahan* opinion put it:

> The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, cl. 14, and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. [395 U.S. at 261.]

It seems apparent that the rationale of service-connection is thus the same as the rationale of Article 134, 10 U.S.C. 934, under which Captain Councilman is charged, and which prohibits in pertinent part: "all disorders and neglects to the prejudice of good order and discipline in the armed forces * * *." Both terms—the jurisdictional and the substantive—are given meaning by the unique nature and special needs of the military. Cf. *Parker* v. *Levy,* No. 73–206, decided June 19, 1974, slip op. 8–17.

There is, of course, no way to codify completely the factors that show service-connection, any more than the military have found it possible to codify all the disorders and neglects that prejudice good order and discipline in the armed forces. *O'Callahan* and *Relford* cite factors that provide guidance for one, just as the offenses listed in the *Manual for Courts-Martial* (1969) assist in illuminating the other. But it is plain that the rationale of both is the bearing of the offense in question on the discipline, morale, and effectiveness of fighting forces.

Measured by that standard, we submit, the service-connection of the offenses charged against Captain Councilman is clear beyond peradventure. Service-connection here exists in each of two ways.

1. The first two offenses with which Captain Councilman is charged are the sale and the transfer of marijuana to an enlisted man. Though these offenses occurred off-base and neither man was in uniform, Councilman knew that his drug transactions were with an enlisted man and must certainly have known that such unlawful dealings between officers

and enlisted men tend to impair discipline and morale in the Army. It certainly does not matter that the enlisted man, Skaggs, was in fact an undercover agent and hence not a "victim" any more than in a civilian prosecution it would matter that a drug sale was made to a plainclothes policeman who did not intend to use the drug. Moreover, the impact of such an unlawful transaction goes far beyond the particular enlisted man who purchases the drug. Councilman knew that his status as an officer was known to Skaggs, and it is apparent that, in the tightly-knit, rumor-prone society of the military, word will usually circulate among the enlisted ranks concerning an officers' participation in such unlawfulness.

Civilian prosecution is not adequate to the needs of the military in such cases. Laws, probabilities of prosecution, and severity of punishment vary widely with respect to drug offenses among the States and within the States. This factor, while not itself perhaps sufficient to show service-connection, is certainly entitled to weight when the conduct is prejudicial to discipline and morale so that uniformity of treatment is in itself an important value in maintaining discipline and morale.

2. The third charge against Captain Councilman, possession of marijuana, is also service-connected. There is some difference of opinion between federal district courts and courts of appeals and the Court of Military Appeals as to the service-connection of off-post possession of drugs. The Court of Military Appeals, though it has been discriminating and care-

ful in its approach and has not found all drug offenses to be service-connected, has upheld court-martial jurisdiction more often than the purely civilian courts. The Court of Military Appeals, though manned by civilian judges, was established to specialize in military offenses and its expertise is entitled to weight in judging the relationship of particular offenses to the special and legitimate interests of the military.

It is, in any event, clear that possession of marijuana and other proscribed drugs, whether off base or on, is properly held service-connected. The effects of drug use are deleterious to mental and physical performance. Certainly, the military think so, there is much evidence to that effect, and it is an allowable judgment with which the judiciary ought not to interfere. The number of drug offenses involving military personnel has increased rapidly in recent years, paralleling the experience of civilian society. Whatever one's views of permissiveness in these matters in civilian life, the military cannot adopt a permissive attitude and remain efficient. If some States decriminalize marijuana use, and if its off-base possession were held not service-connected, the military would suffer not merely from lack of uniformity of treatment but from lowered effectiveness in units stationed in the permissive States. That fact alone shows how important it is that drug possession be held service-connected. There are offenses, and this is one, which civilian jurisdictions may or may not choose to tolerate, but which the armed forces cannot, consistently with their obligations to the nation, afford to overlook.

In *Parker* v. *Levy, supra*, this Court set forth the rationale for military jurisdiction in this case.

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. * * * The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or to be ready to fight wars should the occasion arise." * * * [W]e [have] noted * * * that "the rights of men in the armed forces must perforce be conditioned to certain overriding demands of discipline and duty * * *." [Slip op at 8–9.]

In this context, an offense is properly service-connected if it threatens to undermine the discipline and duty which this Court has recognized as essential to the armed forces.

ARGUMENT

I

DRUG TRAFFICKING BETWEEN AN OFFICER AND AN ENLISTED MAN IS SERVICE-CONNECTED BECAUSE SUCH OFFENSES ARE SEVERELY DETRIMENTAL TO THE DISCIPLINE AND EFFECTIVENESS OF THE ARMED FORCES OF THE UNITED STATES

1. It seems obvious that the requisite relationship of command and obedience between an officer and an enlisted man would be destroyed by criminal dealings between them. An enlisted man can hardly have the proper respect for an officer who has been selling him drugs, nor could an officer maintain the proper command relation to his accomplice in crime. This is only

an obvious concomitant of the long-standing military custom that officers must never behave improperly in the presence of enlisted men.[1] Indeed, even fraternization between officers and enlisted personnel has historically been discouraged by the American military as well as the armed forces of other nations.

The reason for this policy is the apprehension that personal relationships between an officer and his subordinates may interfere with the proper execution of military command. As *The Officer's Guide* (an unofficial, but widely respected, publication) explains (Stackpole Press, 1968–1969 ed., at 17–18):

> The relationship between a commander and his men must be developed to stand the strains of campaign and combat, as well as the less demanding conditions at posts and stations in the United States. There is no precise parallel with other vocations as to this total responsibility, against which to evaluate the need for unusually high standards of conduct, including abstentions. * * *
>
> [I]t is strong tradition that an officer does not gamble, nor borrow money, nor drink intoxicants, nor participate in ordinary social associations with enlisted men on an individual basis. Aggravated violations of the tradition may be handled under the Uniform Code of Military Justice. * * *

---

[1] Winthrop gives as an example of "conduct unbecoming an officer and a gentleman" the offense of "[d]runkenness of a gross character committed in the presence of military inferiors." *Military Law and Precedents*, p. 717 (2d ed., 1920 reprint).

> Even the suspicion of favoritism must be avoided. If an officer has social companions, obvious favorites, or "buddies," among his soldiers, and then sponsors one or more of them for promotion, a preferred assignment, or exemption from duty of special hardship or hazard, he destroys in the all-seeing eyes of others the essential standard of mutual trust and respect.

How much more true this must be of an officer dealing drugs to enlisted men from his own post. See also, *United States* v. *Priest*, 21 U.S.C.M.A. 564, 570.

This well-known rule obviously responds to experience that discipline is harder to maintain when military subordinates come to be on familiar terms with those who must give them orders and who must expect obedience often without the possibility of argument or explanation. Familiarity leading to contempt must be avoided but is never more certain to occur than when an officer participates with an enlisted man in a criminal transaction.

2. The effect of Captain Councilman's conduct on military discipline goes far beyond the two persons directly involved. In a closely-knit military society, criminal or scandalous behavior by an officer with an enlisted man is likely to become widely known, decreasing respect not only for Councilman among the men under his command but decreasing it as well for all officers. It is well known that no officer can maintain discipline if those around him do not. An offense which is thus "to the prejudice of good order and discipline in the armed forces," in the language of

Article 134, is exactly the type of "service-connected" offense over which the military must have jurisdiction. This Court, in *Parker* v. *Levy*, *supra*, recognized (slip op. at 9):

> that a military officer holds a particular position of responsibility and command in the armed forces:
>
> "The * * * President's commission * * * recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to a specified rank during the pleasure of the President." *Orloff* v. *Willoughby* * * *, 345 U.S., at 91.

In order to maintain discipline, an officer must preserve the trust which that commission places in him.

3. The special needs of the military cannot be met solely by civilian prosecution of offenses. If civilian courts could vindicate vital military interests, there would be no occasion for court-martial jurisdiction over any offense. The necessity for military jurisdiction is particularly apparent where, as here, civilian prosecutors and courts vary widely in the seriousness with which they view the offense, some imposing much heavier penalties and some virtually ignoring it, and none of them giving any consideration to the effect upon discipline and morale which is the greatest concern of the military. The military needs to maintain a single standard of discipline, but state policies on drug offenses vary widely. The identical offense might bring a multi-year sentence in one state while being ignored or resulting only in a small fine in another. It would be fair neither to the soldier nor to the service to leave the demands of discipline to the vagaries of state law enforcement.

Were it necessary to relate service-connection with particular factors mentioned in *Relford*, we could mention those such as "The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order" (401 U.S. at 367); "The distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community" (*id.* at 367–368); and "The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as * * * military relationships have important contrary significance" (*id.* at 368). But we submit that the criminal transaction here, between an officer and an enlisted man, is so obviously related to the military's legitimate and unique concern with discipline and morale, and thus so obviously service-connected within the rationale of *O'Callahan* and *Relford* that it would serve no purpose to try to multiply instances of *Relford* criteria applicable here.

II

OFFENSES INVOLVING DRUG POSSESSION ARE SERVICE-CONNECTED BECAUSE THEY THREATEN THE DISCIPLINE AND EFFECTIVENESS OF THE ARMED FORCES.

1. In order to fulfill its mission, the military must have soldiers who are physically and mentally equipped to undertake their duties. The effects of drug use are such that the armed services may properly regard any use as threatening the discipline and effec-

tiveness of the user. This judgment has been confirmed on several occasions by the Court of Military Appeals, "the court to which Congress has confided primary responsibility for the supervision of military justice in this country and abroad." *Noyd* v. *Bond*, 395 U.S. 683, 695.

Thus in *United States* v. *Becker*, 18 U.S.C.M.A. 563, 565, the court held that "use of marihuana and narcotics by military persons on or off a military base has special military significance" in light of the "disastrous effects" of these substances "on the health, morale and fitness for duty of persons in the armed forces." The court also concluded that, "[a]s with the case of use of marihuana, the possession of marihuana by military persons is a matter of immediate and direct concern to the military as an act intimately concerned with prejudice to good order and discipline or to the discredit of the armed forces" (18 U.S.C.M.A. at 565). Accord *United States* v. *DeRonde*, 18 U.S.C.M.A. 575; *United States* v. *Castro*, 18 U.S.C.M.A. 598, 600; *United States* v. *Boyd*, 18 U.S.C.M.A. 581; *United States* v. *Adams*, 19 U.S.C.M.A. 75. Possession, particularly in the amounts involved here, is, quite obviously, indicative of use and is equally forbidden. The court's rationale is thus based squarely on legitimate military interests. If drug use by a serviceman affects his subsequent fitness for duty, the military can scarcely fail to be concerned about possession as well as use.

It should be noted that the Court of Military Appeals has strictly limited the reach of court-martial

jurisdiction to exclude drug offenses which do not imply use of drugs by a serviceman. Thus, sales of marijuana and LSD off post by a serviceman to a *civilian* have been held not to be service-connected (*United States* v. *Morley,* 20 U.S.C.M.A. 179; cf. *United States* v. *Pieragowski,* 19 U.S.C.M.A. 508); but the court has held delivery of prohibited drugs from one serviceman to another, whether on or off base, to be as service-connected as possession because the delivery "serve[s] as a conduit for the unlawful possession of another. The deleterious effect on the health, morale, and fitness for duty of persons in the armed forces is the same." *United States* v. *Rose,* 19 U.S.C.M.A. 3, 4.[2]

In holding that these off-post drug offenses directly affect military discipline, the military courts, of course, are acting within their area of special competence. This Court has recognized that determinations of whether conduct prejudices "good order and military discipline" are "the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts." *Swaim* v. *United States,* 165 U.S. 553, 562. See also *Smith* v. *Whitney,* 116 U.S. 167, 178; *Dynes* v. *Hoover,* 20 How. 65, 79.

[2] An additional rationale underlying the court's distinction between delivery to another serviceman and to a civilian is that the military has a special interest—which local civilian authorities may not fully vindicate—when the accused and the victim (or participant) are active duty servicemen. Cf. *United States* v. *Rego,* 19 U.S.C.M.A. 9; *United States* v. *Cook,* 19 U.S.C.M.A. 13.

The military courts, including the Court of Military Appeals, have special competence not only to evaluate violations of military order, but also to decide what dispositions of particular cases will best meet the practical needs of the armed forces in maintaining discipline.[3] For these reasons their decisions with regard to disciplinary problems are entitled to deference from the civil courts.

The court of appeals in the instant case, however, has taken the position, contrary to that of the Court of Military Appeals, that off-base possession of marijuana and transfer to another serviceman are not of sufficient military significance to be service connected.[4]

[3] See Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962).

[4] The civil courts have generally concluded that, in light of *O'Callahan* and *Relford*, an on-base narcotics violation is an offense cognizable by court-martial. *Diorio* v. *McBride*, 431 F. 2d 730 (C.A. 5) (on-post use and possession of marijuana); *Messina* v. *Commanding Officer*, 342 F. Supp. 1330 (S.D. Cal.) (sale of marijuana and hashish by servicemen aboard Naval Weapons Center).

With respect to off-post narcotics offenses, however, a number of civil courts have held that certain off-post drug offenses are not service-connected. The Fifth Circuit has held that the use of marijuana by a serviceman off post and off duty is not service connected. *Cole* v. *Laird*, 468 F. 2d 829. A number of district courts have reached similar conclusions with regard to marijuana and other drugs. *E.g.*, *Moylan* v. *Laird*, 305 F. Supp. 551 (D. R.I.); *Lyle* v. *Kincaid*, 344 F. Supp. 223 (M.D. Fla.); *Schroth* v. *Warner*, 353 F. Supp. 1032 (D. Hawaii); *Redmond* v. *Warner*, 355 F. Supp. 812 (D. Hawaii). (A few of these decisions, *e.g.*, *Moylan* and *Lyle*, *supra*, have indicated that a serviceman's *use* of marijuana—as distinguished from possession—even if off base and off duty, might have special military significance.)

Some civil courts, on the other hand, have held that the military does have jurisdiction over certain off-post drug

In reaching that conclusion, the court has seriously underestimated the threat to military discipline, morale, and effectiveness in the use of prohibited drugs, including marijuana, by servicemen on active duty.

2. The fact is that drug abuse is a far more serious problem in the military context than in civilian life. That is not, of course, because drugs—marijuana or any other prohibited drug—affect a soldier more than a civilian. Rather, the difference is that the effects—on discipline, morale and effectiveness—matter less in non-military activities. Indeed, even if civilian jurisdictions were to lift their criminal sanctions against marijuana smoking, the case for continuing the military prohibition would be unaffected. The military concern is discrete, and the propriety of treating drug use as a military offense ought not be prejudiced by the coincidence that it is also criminally punished in most civilian jurisdictions.

The point is illustrated by considering the long-standing military rule with respect to liquor. Winthrop notes:

> [S]imple drunkenness is in general a military offence in violation of [the General] Arti-

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offenses. See, *e.g.*, *Scott* v. *Schlesinger*, No. C.A. 4-2371 (N.D. Tex., Oct. 1, 1973) (off-post sales of marijuana and LSD to servicemen); *Herrin* v. *Richardson*, No. C.A. 120-73-A (E.D. Va., Oct. 17, 1973) (off-post possession and use of marijuana, between watch assignments, by servicemen who had contact with classified material); *Peterson* v. *Goodwin*, No. C.A. EP-73-105 (W.D. Tex., Aug. 22, 1973) and *Walden* v. *McLucas*, C.A. No. 3-2892 (E.D. Cal., Dec. 21, 1973) (off-base possession of narcotics, including heroin, and distribution to another serviceman).

> cle * * *. Hough [on *Courts-Martial,* 1825] remarks that— "* * * drunkenness constitutes of itself a breach of military discipline." * * * Gen. Crook well observes: "Drunkenness by persons in the military service is an offence against good order and military discipline whenever and wherever it occurs." [*Military Law and Precedents, supra,* at 722–723.]

And the Court of Military Appeals has stated: "in the military sphere, drunkenness in the privacy of one's own quarters is a punishable offense. Manual for Courts-Martial, * * * ¶ 127c, page 225." *United States* v. *Lowe,* 4 U.S.C.M.A. 654, 658.

These considerations apply with added force to drug use. The military, just as most civilian jurisdictions, has determined that use of drugs is even more harmful than use of alcohol. Thus, simple possession or use of alcohol is not made an offense under the military law unless alcohol consumption proceeds to the stage where drunkenness impairs fitness for duty. The military, like most civilian authorities in the United States and in the world, regards drug use, on the other hand, as intrinsically harmful to the individual and hence prejudicial to the military's claim to his effective services. This is certainly an allowable judgment, supported by evidence and experience, and courts ought not to undertake to revise it or to deny the connection between drug use and service ineffectiveness.

3. The case might be different if we were dealing with a rare and peripheral occurrence which the military might be content to leave to civilian control. But

the reality is otherwise. Drug abuse is a serious *military* problem partly because of its huge dimensions. Many thousands of instances obviously have a cumulative impact, which legitimately invokes military concern. So, also, the practical difficulties of effectively dealing with so many infractions through civilian courts bears on the appropriateness of military jurisdiction.

The number of cases of drug abuse requiring investigation has risen dramatically in recent years. Such cases involving narcotics rose from 521 in 1966 to 3,401 in 1970. For marijuana cases the increase in the same period was from 3,096 to 26,902. For other non-narcotic drugs the increase was from 917 to 7,541. Hearings before the Subcom. on Alcoholism and Narcotics of the Senate Committee on Labor and Public Welfare, on Military Drug Aubse, 1971, 92d Cong., 1st Sess., pp. 120–127.

To combat this problem, the armed forces have embarked on ambitious programs of drug and alcohol abuse prevention and control. See Department of Army Circular 600–85. These programs have been made a top priority of field commanders and have occupied increasing time and energy of the military. The budget for such programs in fiscal year 1974 was more than $70 million. Hearing before the Subcommittee on Drug Abuse in the Military Services of the Senate Committee on Armed Services, on Review of Military Drug and Alcohol Programs, 93d Cong., 1st Sess., p. 110. More than 86,000 servicemen underwent some type of rehabilitation for drug abuse in fiscal years 1972 and 1973, and only 52 percent of these

were able to return to duty after rehabilitation. *Id.* at 109.

Cases warranting punishment are also at a high level. We are informed by the Department of Defense that in 1972 the Army alone imposed 4,186 non-judicial punishments and held 2,065 courts-martial for drug-related offenses. In 1973 the comparable figures were 9,890 and 2,637, increases of over 130 per cent and 20 percent, respectively, in just one year.

Moreover, much of this problem originates off base. Of course, virtually all prohibited drugs must originate outside the post area, and they will often be the subject of trafficking in the surrounding community. We are also informed by the Department of Defense that during the period July–September 1973, there were 2,954 drug offenses involving Army personnel reported to the Military Police, of which 27 percent took place off base.

As these figures show, there can be no neat division of the drug problem between on-base and off-base use. As the Court of Military Appeals noted in *Rainville* v. *Lee*, 22 U.S.C.M.A. 464, 465, drug use anywhere adversely affects the "plain obligation of our armed forces to maintain * * * the capacity of all service personnel to function as an effective force." In order to fulfill that obligation, the armed services must be able to deal with conditions that damage that capacity, wherever they occur. The services may legitimately make the judgment that off-base drug offenses are an integral part of the threat to good order and discipline posed by soldiers who use drugs and thus are subject to military jurisdiction.

In summary, both Councilman's status as an officer and the detrimental effect of drug use on military effectiveness disprove the court of appeals' unwarranted assertion that the crime here charged "affects military discipline no more than the commission of any crime by any serviceman" (Pet. App. A, p. 13).[5]

CONCLUSION

It is, therefore, respectfully submitted that the decision of the court of appeals should be reversed.

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SEPTEMBER 1974.

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[5] Contrary to the court of appeals' suggestion (Pet. App. A, pp. 9–11), the impact of these offenses is not diminished because the drug purchaser here was an undercover agent rather than, as Councilman believed, an enlisted man from his own post. Undercover agents may legitimately be used to detect crimes, and are almost a necessity in drug investigations. Defendants cannot reasonably argue that transfer of drugs to agents posing as partners in crime should be judged as "victimless" conduct. See *United States* v. *Russell*, 411 U.S. 423, 432–436. Accordingly, for the purposes of this case, we must view the drug purchaser, as did Councilman, as an enlisted man from Fort Sill obtaining drugs for his own use. The contrary position would wholly eliminate the use of undercover agents, on or off base, in the effort to punish and deter drug abuse.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-662

JAMES R. SCHLESINGER, ET AL., PETITIONER

v.

BRUCE R. COUNCILMAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT ON THE MERITS

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INDEX

Page

Statement 1

Question Presented 2

Introduction and summary of argument 3

Argument 4

Proposition. The offenses alleged here are outside the scope of "service connection" as previously defined by this Court 4

Summary and Conclusion 15, 16

CITATIONS

Cases:

Cole v. Laird, 495 F. 2d 829 15

Moylan v. Laird, 305 F. Supp. 551 14

O'Callahan v. Parker, 395 U.S. 258 ..... 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13

Relford v. Commandant, 401 U.S. 355 ..... 3, 4, 8, 9, 11, 13, 14

U.S. ex rel Flemings v. Chafee, 330 F. Supp. 193 14

U.S. v. Morley, 43 C.M.R. 19 12

U.S. v. Mueller, CM 420337 13

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BRIEF FOR RESPONDENT ON THE MERITS

STATEMENT

Respondent concurs with the statements set out in Petitioner's Brief on the Merits under the headings *OPINIONS BELOW* and *JURISDICTION*. At the request of this Court, Respondent has previously filed a Brief on the Jurisdictional Issues which we request be incorporated in our Brief on the Merits.

Respondent, Councilman, a Captain in the United States Army, stationed at Fort Sill, Oklahoma was charged under the Uniform Code of Military Justice with the wrongful sale and transfer of marijuana to an enlisted man, Army Specialist 4 Glen D. Skaggs. He also was charged with the wrongful possession of marijuana which took place on another occasion. 1/

1/ The first charge was a wrongful sale of marijuana to Specialist 4 Glen D. Skaggs in Lawton, Oklahoma, on March 15, 1972; at 10:30 p.m., of .208 ounces of marijuana. The second charge was the transfer of marijuana to Specialist 4 Glen D. Skaggs in Lawton, Oklahoma on March 15, 1972, at 1:15 a.m. of two marijuana cigarettes. The third charge was wrongful possession of marijuana at Councilman's apartment in Lawton, Oklahoma, on March 18, 1972, of 1.410 ounces of marijuana.

Captain Councilman sought to have the Court-Martial proceedings dismissed for lack of jurisdiction, but his motion was denied by the presiding Judge of the Court-Martial and this suit was commenced.

The facts involved here which are not in dispute are as follows: United States Army authorities were advised by a confidential informant that Captain Councilman was using marijuana in his off-post apartment in Lawton, Oklahoma. Thereafter, at a party to which Captain Councilman was invited for that purpose, he was introduced to an undercover agent of the Army's Criminal Investigation Division, Specialist 4 Glen D. Skaggs. Skaggs, at the time, was using the name Danny Drees and was introduced to Councilman as an Army Clerk Typist, also stationed at Fort Sill. Thereafter, it is alleged that Councilman on one occasion transferred and on another, sold small amounts of marijuana to Skaggs, alias Drees. Based on Skaggs' investigation, Councilman was apprehended by civilian authorities and a search of his apartment turned up a small quantity of marijuana. Skaggs, from time to time, also acted on behalf of the civilian authorities. Councilman was subsequently turned over to the Military authorities and the Court-Martial proceedings here in issue were commenced. During all times relevent to the issues in this case, it has been stipulated that Councilman was off-post, off-duty, and out of uniform and that Skaggs was off-post and out of uniform, and although ostensibly off-duty, he was in fact, on duty in his capacity as an undercover agent.

QUESTION PRESENTED

The question presented is whether a Court-Martial has jurisdiction to try a member of the Armed Forces, who is charged with the commission of a crime cognizable in a Civilian Court and having as its only Military significance, the involvement of an undercover CID Agent, where the offense was alleged to have been

committed off-post, during off-duty hours and while out of uniform, thus depriving a service man of his Constitutional Rights to indictment by Grand Jury and a trial by a jury of his peers in a Civilian Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The case now before the Court, as did O'Callahan v. Parker 395 US 258, 23 L. Ed. 2nd 291 89 S. Ct. 1683 and Relford v. Commandant 401 US 355 28 L. Ed. 2nd 102 91 S. Ct. 649, falls within the area of stress between the Guarantees contained in Article III, Section 2, Cl. 3 of the Constitution, in the Fifth and Sixth Amendments on the one hand, and on the other, the power vested in Congress in Article I, Section 8, Cl. 14, of the Constitution "to make rules for the Government and Regulation of the Land and Naval Forces", with its supportive necessary and proper provisions in Clause 18, and the Fifth Amendment's correlative exception for "cases arising in the Land or Naval Forces".

The Brief of Petitioners on the Merits argues that the offenses of sale and transfer of marijuana by an Army Officer to an Army enlisted man and the possession of marijuana by an Officer are "service connected" and thus, within Military Court-Martial jurisdiction, even though the alleged offenses occurred off-post, off-duty, out of uniform and while the "enlisted man" involved was in fact an undercover agent. The apparent reason for the position of the Petitioner is the status of the Officer and the enlisted man.

We would assert that the requirement of indictment by a Grand Jury and a right to a jury trial are not forfeited by a person, simply because he chooses, or is in some cases, required to serve his Country as a member of the Armed Forces. We would agree with Petitioner that these rights, at some point, must give way to the need of the Military to maintain discipline so it can carry

out its function—that of fighting, or being ready to fight wars. We would assert, however, that in the instant case there is no Military connection other than the fact that Councilman and the undercover Agent, Skaggs, were both members of the Military. The offenses alleged here effect the function of the Military and discipline no more than the commission of any other crime by any service man, i. e., Public drunk, DWI, Robbery, Murder, etc.

This Court has set forth criteria for determining whether the requisite "service connection" exists to deny a service man his Constitutional rights to a trial by a jury of his peers, indictment by a Grand Jury and the attendant safeguards accorded to individuals in trials by Article III Courts. The Courts below have applied these criteria as enumerated in O'Callahan and Relford and properly have resolved the question here in favor of individual liberties and against the expansion of Military authority beyond its proper domain. We would urge this Court to affirm the decision below.

ARGUMENT

Proposition: The Offenses Alleged Here Are Outside The Scope Of "Service Connection" As Previously Defined By This Court.

In order for a Military Tribunal to obtain jurisdiction to try a service man, the offense charged must be "service connected". O'Callahan, Supra. In the O'Callahan case, the Petitioner, then a Sergeant in the United States Army, was charged with attempted rape, housebreaking and assault with intent to rape, in violation of Articles 80, 130 and 134 of the Uniform Code of Military Justice. He was tried by Court-Martial, convicted on all counts and given a sentence of ten years in prison at hard labor, forfeiture of all pay and allowances and a dishonorable discharge. The offense occurred in Hawaii while the Petitioner was on an evening pass, and the victim of the

crime was a member of the civilian community. The Supreme Court granted certiorari to answer the question:

> "Does a court-martial, held under the Articles of War, Tit 10, USC Sec. 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a Grand Jury and trial by a petit jury in a civilian court?" 393 US 822, 21 L Ed 2d 93, 89 S Ct 177.

Mr. Justice Douglas in delivering the opinion of the Court stressed the importance of the distinction between the language in the Fifth Amendment, which specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and from the right to a trial by jury, and the language in the Sixth Amendment and in Art. III, Sec. 2, of the United States Constitution, which accord the accused the benefit of an indictment by a grand jury and a trial by a jury of his peers in a civilian court if the case does not arise "in the land or naval forces."

Those civil rights are the constitutional stakes in the present case, just as they were in the O'Callahan case.

The Supreme Court stated a number of reasons why the Fifth Amendment language which exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and from the right to trial by jury should be construed narrowly.

FIRST:

> "A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote."

SECOND:

"The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer."

THIRD:

"Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."

FOURTH:

"A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved."

FIFTH:

"That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty."

SIXTH:

"While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. Article 134, already quoted,

punishes as a crime 'all disorders and neglects to the prejudice of good order and discipline in the armed forces.' Does this satisfy the standards of vagueness as developed by the civil courts? It is not enough to say that a court-martial may be reversed on appeal. One of the benefits of a civilian trial is that the trap of Article 134 may be avoided by a declaratory judgment proceeding or otherwise."

AND AS IF IN SUMMARY:

A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."

In the O'Callahan case, the Supreme Court held that the court-martial had no jurisdiction to try the Petitioner for the particular offense. The court stressed that the Petitioner was properly absent from his military base when he committed the crimes with which he was charged. There was no connection — not even the remotest one — between his military duties and the crimes in question. The crimes were not committed on a military post; nor was the person whom he attacked performing any duties relating to the military. Moreover, the situs of the crime, Hawaii, was not an armed camp under military control. The offense occurred during peacetime. The civil courts were open. The offense was committed within the United States Territorial Limits. The offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.

In the present fact situation, Councilman was properly absent from his military base when the crimes with which he is charged were allegedly committed. There was no connection between Councilman's military duties and the crimes in question. The crimes were allegedly committed

not on a military post but in a civilian community. The alleged crime occurred in the State of Oklahoma in March of 1972 — certainly not an armed camp under military control. The alleged offense did not involve any question of the flouting of military authority nor the security of a military post, nor the integrity of military property.

The only possible distinction between the fact situation now presented to this Court and this Court's holding in the O'Callahan case, concerns the fact that the victim in O'Callahan was a member of the civilian community, while the alleged "victim" in this fact situation was an undercover CID Agent. This distinction will be more fully discussed later in the Brief, but it is submitted that the distinction, if any, does not make this fact situation sufficiently "service-connected" to deny Councilman his rights to a trial by jury in a civilian court as guaranteed by the Sixth Amendment.

The Supreme Court in Relford v. Commandant, U. S. Disc. Barracks, Ft. Leavenworth, 401 U. S. 355, 91 S. Ct. 649, 28 L. Ed. 2d 102 (1971), has enumerated twelve factors to be considered in deciding whether a particular crime by a serviceman is service connected. They are:

"1. The serviceman's proper absence from the base.

"2. The crime's commission away from the base.

"3. Its commission at a place not under military control.

"4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

"5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

"6. The absence of any connection between the defendant's military duties and the crime.

"7. The victim's not being engaged in the performance of any duty relating to the military.

"8. The presence and availability of a civilian court in which the case can be prosecuted.

"9. The absence of any flouting of military authority.

"10. The absence of any threat to a military post.

"11. The absence of any violation of military property.

"12. The offense's being among those traditionally prosecuted in civilian courts." 401 U. S. at 365, 91 S. Ct. at 655.

In the Relford case, the Supreme Court also enumerated the following interests which, if present, point strongly to service connection:

"(a) The essential and obvious interest of the military in the security of persons and of property on the military enclave. ***

"(b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order. ***

"(c) The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

"(d) The conviction that Article I, Sec.8, Clause 14, vesting in the Congress the power 'To make Rules for the Government and Regulations of the land and naval Forces,' means, in appropriate areas beyond the purely military offense,

more than mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish.

"(e) The distinct possibility that civil courts, particularly non federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary problems within its own community. ***

"(f) The very positive implication in O'Callahan itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.

"(g) The recognition in O'Callahan that, historically, a crime against the person of one associated with the post was subject even to the General Article. ***

"(h) The mis-reading and undue restriction of O'Callahan if it were interpreted as confining the Court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law. (and)

"(i) Our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a service-defendant's on-duty and off-duty activities and hours on the post." 401 U. S. at 367-369, 91 S. Ct. at 656-657.

The application of the lettered interests to the present fact situation reveal only a tenuous argument for service connection. There is no basis for suggesting that the civilian Courts have any different criteria for the trial

and punishment of service men accused of the types of crime here alleged, than for civilians. There is also no basis for suggesting that the civilian Courts open here have less than an active interest in the types of offenses alleged. Further, the record reflects absolutely no use of Councilman's rank to influence the undercover CID Agent's actions here. At all times concerned, both Councilman and the CID Agent, Skaggs, in fact, behaved toward each other as one civilian man to another. There is to be sure, some "service connection" in virtually anything by a member of the Armed Forces does. Any crime committed by a member of the Armed Forces must have some "service connection" i.e. some effect on the Commanding Officer's duty and responsibility to maintain order and discipline in the ranks.

Let the issue not be clouded on this point, however. Not everything a service member does is sufficiently "service connected" to strip him of his constitutional rights and confer court-martial jurisdiction. The Fifth Amendment to the United States Constitution specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger" from the requirement of prosecution by indictment and from the right to trial by jury. If the offense is not sufficiently "service connected" to come under this exception, then the accused — serviceman or not — should be accorded his full constitutional rights for the reasons set out in the O'Callahan opinion, infra.

While it is difficult to say with certainty the degree of "service connection" present in applying the lettered interests of Relford, the numbered interests of Relford interpreting O'Callahan are easier to apply. Of the twelve factors enumerated in the Relford decision, Numbers 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 12 clearly point away from court-martial jurisdiction. Only on Point 7 can there be even an argument that court-martial jurisdiction is proper.

It is submitted that Point 7 should be considered only in crimes where there is a victim, such as murder, rape or theft. It is further submitted that there is no victim to the crime of possessing or selling marijuana. Even if it is conceded that there is a victim in the crime of sale and transfer of marijuana, a distinction should be made for victims "engaged in the performance of a duty relating to the military" and the alleged victim in this situation. In the present fact situation, Councilman was invited to a party by undercover Agents who introduced Councilman to the CID Agent, Skaggs. The alleged offenses here involve the CID Agent who was posing as a Specialist 4 in the Army. It is conceded that the CID Agent was in fact performing a duty on behalf of the military, but it is submitted that the informer was not the type of "military victim" which Point 7 of the above interests is intended to encompass.

There are several factors which support this argument and point away from court-martial jurisdiction in this case. First, although the CID Agent was in the military and was posing as a Specialist 4, he was never in uniform at the time the alleged offenses occurred. Second, the alleged offenses occurred off-base at a private apartment and during off-duty hours. Third, the CID Agent was also involved with the arrest of numerous other persons, both civilian and military.

This case bears a close factual relationship to United States v. Larry D. Morley, 20 USCMA 179, 43 CMR 19, in which it was held that a court-martial has no jurisdiction to try the accused on charges of selling marijuana and LSD where the offenses occurred off base in a civilian community in Kansas, and the purchaser was a civilian. In the Morley case, the informers were Federal Narcotics Agents. The Court held that the off-base sale of marijuana and LSD to a member of the civilian community, the Federal Narcotics Agent, was not a service-connected offense, and that the court-martial was

without jurisdiction to proceed. It is true that the informer here was a CID Agent and not a Federal Narcotics Agent, and that the CID Agent was posing as a member of the military. These factual distinctions should not cloud the main issue however. The main issue is whether the alleged offense is sufficiently "service-connected" to deprive this Defendant of his constitutional rights to a trial by a jury in a civilian court. We submit that this alleged offense is clearly not sufficiently service- connected to give jurisdiction to the military courts.

The present facts are also very similar to United States v. Daniel E. Mueller, CM 420337, in which a CID Agent posing as a Specialist 4 purchased marijuana from the Defendant at an apartment off base in Leavenworth, Kansas. In the Mueller case, the Defendant pleaded guilty, but the Court went on to reason that the appellant's offenses were service-connected. The Court attempted to distinguish O'Callahan on the grounds that the O'Callahan offenses directly involved a civilian victim while reasoning that there was no civilian victim in the Mueller case. The Court also reasoned that O'Callahan was not applicable because the CID Agent was in fact performing a duty on behalf of the military by participating in the transfer. Finally, the Court held that mere possession of marijuana imports service connection because it at least potentially involved the good order, discipline and reputation of the Armed Forces.

Even though the Military Court in the Mueller case cited the O'Callahan opinion, they clearly did not follow its mandate. The military should not be allowed to "manufacture" jurisdiction for themselves by having CID Agents pose as servicemen when the same offense if involving a civilian would clearly be outside military jurisdiction. This back-door approach to avoiding the import of the Supreme Court's decision in O'Callahan and Relford should not be allowed.

It is submitted that all twelve of the factors set out in O'Callahan and enumerated in Relford point away from military jurisdiction in this case. It is possible, however, that the O'Callahan and Relford cases will operate to deprive the military of jurisdiction even if one or more of the factors point toward military jurisdiction. In United States ex rel Flemings v. Chafee, 330 F. Supp. 193 (1971), the Petitioner was improperly absent from his military base at the time of the alleged offense, and the offense was committed during World War II. The Court said that Relford Points 2, 3, 4, 6, 7, 8, 9, 10, 11 and 12 clearly pointed away from court-martial jurisdiction, while Points 1 and 5 supported the finding of service connection. The Court went on to hold that neither of the two factors enumerated permitted a finding of "service connection."

Federal Courts have had occasion to decide at least two cases with close factual similarity to the case before this Court. In Moylan v. Laird, 305 F. Supp. 551 (1969), a member of the United States Marine Corps was granted an injunction by the District Court of Rhode Island, prohibiting military authorities from subjecting him to an unconstitutional court-martial for the off-base possession of marijuana within the peripheries of the civilian United States. In the Moylan case, the Petitioner was absent without leave at the time of the alleged offense and had on his person 42.5 ounces of marijuana, which may have indicated an intention to distribute. Since the Petitioner in Moylan was absent without leave at the time of the alleged offense at least one of the Relford points would support the finding of service connection. The Court, however, stated that there was no "service connection" in the off-base possession of marijuana. The Court reasoned:

> "No more so than the commission of other crimes does this particular crime (possession of marijuana) tend to undermine military authority."

and went on to hold:

> ". . . that off-base possession of marijuana within the peripheries of the civilian United States is not a matter over which the military jurisdiction extends."

The Fifth Circuit Court of Appeals has also been presented with a question bearing a close factual similarity to the question before this Court. In Cole v. Laird, 495 F. 2d 829 (1972), a serviceman was convicted by a court-martial for the unlawful use of marijuana. He petitioned the Federal Courts for injunctive relief on the ground that the court-martial was without jurisdiction to try him for the offense. The Fifth Circuit Court of Appeals held that since the Petitioner serviceman was off-post, off-duty and in civilian clothes at the time of the alleged offense, the constitutional requirement of "service connection" was not present and the military had no authority to try him by court-martial. The Court also pointed out that the Petitioner's use and possession of 5.9 grams of marijuana indicated only a casual connection with the drug. The Petitioner in the case before this Court now also involves exactly 5.9 grams of marijuana.

SUMMARY AND CONCLUSION

Under the present facts, the question presented to this Court is whether a court-martial has jurisdiction to try a member of the Armed Forces who is charged with a commission of a crime cognizable in a civilian court having as its only military significance, the involvement of an undercover CID Agent where the alleged offense was committed off-post, during off-duty hours and while out of uniform. If the Court finds sufficient "service connection" herein, the Defendant will be deprived of his Constitutional rights to indictment by Grand Jury and a trial by a jury of his peers in a Civilian Court.

We emphasize that the function of the military is the

defense of our nation. It is the function of our judicial system to try persons accused of crime.

To be sure, the military has need of a specially formed system of court-martial to administer and enforce authority within the military establishment. That specially formed system for the enforcement of military rules however, should not be extended beyond that for which it was intended.

The offenses here alleged are outside the scope of "service connection" as previously defined by this Court. The Judgment of the Court below should therefore be affirmed.

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No. 73-662

In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES R. SCHLESINGER, ET AL., PETITIONERS

v.

BRUCE R. COUNCILMAN, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OCTOBER TERM, 1973

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v.

BRUCE R. COUNCILMAN, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nicholas D. Garrett and Orin Christopher Meyers of Godlove, Joyner, Godlove, Garrett & Meyers, Inc., Attorneys for Bruce R. Councilman, sumbit this Brief in opposition to the Petition which the Solicitor General filed on behalf of the Secretary of Defense, et al., for a writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is set out in Appendix A, *infra, pp.* 7-11 and is reported at 481 F.2d 613.

The opinion of the United States District Court for the Western District of Oklahoma is set out in

Appendix B, *infra, pp.* 12-15. The United States District Court for the Western District of Oklahoma also entered a memorandum opinion and Order Overruling Petition for Reconsideration. This opinion is set out at Appendix C, *infra, pp.* 16-19. Neither opinion of the District Court is published in the official reporters.

QUESTION PRESENTED

Whether a Court Martial has jurisdiction to try a member of the Armed Forces who is charged with the commission of a crime cognizable in a Civilian Court and having as its only Military significance the involvement of an undercover CID agent where the offense was alleged to have been committed off post and during off-duty hours, thus depriving the serviceman of his constitutional right to indictment by a Grand Jury and a trial by a jury of his peers in a Civilian Court.

STATEMENT OF THE CASE

The facts in this case are not in dispute. A stipulation of the facts in this case is set out in Appendix D, *infra, pp.* 20-23. The facts have again been stated by the Court of Appeals in its opinion (Appendix A, *pp.* 7-9).

Bruce R. Councilman is a Captain on active duty in the U.S. Army, stationed at Fort Sill, Oklahoma. Army authorities were advised by a confidential informant that Captain Councilman was using marijuana in his off-post apartment. Thereafter, at a party, to which he was invited for that purpose, Captain Councilman was introduced to an undercover Agent of the Army's

Criminal Investigation Division. The undercover Agent, Specialist Four, Glen D. Skaggs, used the alias Danny Drees and represented himself to be an Army Clerk-Typist, also stationed at Fort Sill. Thereafter, it is alleged that Councilman, on one occasion transferred and on another occasion sold small amounts of marijuana to the undercover Agent.

As the result of the undercover Agent's investigation, Captain Councilman was apprehended by Civilian authorities and a search of his apartment turned up a small quantity of marijuana. Skaggs, from time to time, also acted on behalf of the civilian authorities. Councilman was subsequently turned over to the Military authorities and was charged before an Army Court Martial with three offenses under the Uniform Code of Military Justice, those offenses being:

> (1) Wrongful sale of marijuana to Specialist Four Glen D. Skaggs in Lawton, Oklahoma, on March 15, 1972, at 10:30 p.m. 1/
>
> (2) Transfer of marijuana to Specialist Four, Glen D. Skaggs in Lawton, Oklahoma on March 15, 1972, at 1:15 a.m. 2/
>
> (3) Wrongful possession of marijuana at his apartment in Lawton, Oklahoma, on March 18, 1972. 3/

1/ It was not stipulated in the Court below but it is not in dispute that the amount of marijuana involved in this charge is 5.9 grams, or .208 ounces.

2/ It was not stipulated in the Court below but it is not in dispute that the amount of marijuana involved in this charge is two cigarettes.

3/ It was not stipulated in the Court below but it is not in dispute that the amount of marijuana involved in this charge is 39.98 grams, or 1.410 ounces.

At all times relevant to this case, it has been stipulated that Captain Councilman was off-post, off-duty, out of uniform, and that the undercover Agent, Skaggs, was off-post and out of uniform and although ostensively off-duty was in fact on duty in his capacity as an undercover agent.

Motions were filed and presented to the presiding Military Judge of the Court Martial Proceedings to dismiss the charges against Captain Councilman on the ground the Military had no jurisdiction to try him in a Court Martial Proceeding. Briefs were filed, evidence heard and the Motion was denied. The Court Martial Proceedings were set for trial to begin at 9:00 a.m., on July 11, 1972. Captain Councilman then sought a temporary restraining Order in the District Court for the Western District of Oklahoma, enjoining the Army from proceeding with the Court Martial. The District Court, after hearing argument, issued an Order enjoining the Court Martial proceedings on the ground the Court Martial lacked jurisdiction to try Captain Councilman for the alleged offense because they were not service connected. The Tenth Circuit Court of Appeals has affirmed the decision of the District Court.

REASONS FOR DENYING THE WRIT

Petitioners plea for a writ of Certiorari to review the Judgment of the United States Court of Appeals for the Tenth Circuit should be denied because:

(1) The U.S. Supreme Court has already considered the major questions raised here in *O'Callahan v. Parker,* 395 U.S. 258 and *Relford v. Commandant,* 401 U.S. 355. These cases have held that there must be a sufficient "service connection" to confer Court Martial

jurisdiction, thereby denying the servceman his constitutional right to a trial by a jury of his peers in a civilian Court. In the *Relford* decision the Supreme Court set forth twelve numbered tests and nine lettered interests which it considered to be implicit in the *O'Callahan* case for measuring "service connection".

The Circuit Court, in the present case, properly reasoned that eleven of the twelve numbered tests pointed clearly away from Court Martial Jurisdiction. Only on the "victim" point did the Court indicate consideration was needed. The Court properly reasoned that the undercover agent was not the type of Military "victim" the *Relford* decision was designed to encompass.

As to the lettered interests of *Relford,* the Circuit Court in the present case, properly determined that none pointed toward "service connection" and that no more than the commission of any crime does this type of alleged crime affect Military discipline.

(2) Captain Councilman was charged under Article 134 of the Uniform Code of Military Justice. Although the question has not been presented in this case, the constitutionality of the entire Article has been challenged, see *Averech v. Secretary of the Navy,* 41 U.S.L.W. 2497 (D.C. Cir. March 20, 1973) also *Levy v. Parker,* 41 U.S.L.W. 2597 (3rd Cir. April 18, 1973). Since the validity of Article 134 is not considered here, the precedent value of any decision by the Court in this case would be limited.

For these reasons the petition for a Writ of Certiorari should be denied.

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APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 72–1812

(Filed July 19, 1973)

BRUCE R. COUNCILMAN, APPELLEE

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE, ET AL., APPELLANTS

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 72–462)

Anthony J. Steinmeyer, Attorney, Department of Justice (*Harlington Wood, Jr.,* Assistant Attorney General, *William R. Burkett,* United States Attorney, *Walter H. Fleischer* and *Michael H. Stein,* Attorneys, Department of Justice, with him on the Brief) for appellants.

Nicholas D. Garrett and *Orin Christopher Meyers,* Lawton, Oklahoma, for appellee.

Before SETH, HOLLOWAY, and MCWILLIAMS, Circuit Judges

SETH, *Circuit Judge.*

Appellants, defendants below, appeal from an order of the United States District Court for the Western District of Oklahoma, permanently enjoining the de-

fendants from continuing with court-martial proceedings against appellee.

As a basis of its order, the trial court found that the offenses with which appellee was charged by the military were not "service connected" within the meaning of that term as developed in the decisions of the Supreme Court of the United States in *O'Callahan* v. *Parker,* 395 U.S. 258, and *Relford* v. *Commandant,* 401 U.S. 355.

Appellee Councilman, a Captain in the United States Army stationed at Fort Sill, Oklahoma, was charged under the Uniform Code of Military Justice with the wrongful sale and transfer of marijuana to an enlisted man, Army Specialist Four Glenn D. Skaggs. He was also charged with the wrongful possession of marijuana which took place on another occasion. Although Captain Councilman was charged under Article 134, the general article, the constitutionality of which has been questioned, see *Avrech* v. *Secretary of the Navy,* 41 U.S.L.W. 2497 (D.C. Cir. March 20, 1973); *Levy* v. *Parker,* 41 U.S.L.W. 2597 (3d Cir. April 18, 1973); that issue is not presented to us, and it is unnecessary to decide it in the context of this case.

Councilman sought to have the court-martial proceedings dismissed for lack of jurisdiction, but his motion was denied by the presiding judge of the court-martial. This suit was then commenced.

The facts, which are not in dispute, are as follows: The Army authorities were advised by a confidential informant that Councilman was using marijuana in his off-post apartment. Thereafter, at a party to which he was invited for that purpose, Captain Councilman was introduced to an undercover agent of the Army's Criminal Investigation Division, Specialist Four Glenn D. Skaggs. Skaggs was using the name Danny

Drees, and was introduced to Councilman as an Army clerk-typist, also stationed at Fort Sill. Thereafter it is alleged that Councilman on one occasion transferred, and on another sold, small amounts of marijuana to Skaggs, alias Drees.

Based on Skaggs' investigation, Councilman was apprehended by civilian authorities, and a search of his apartment turned up a small quantity of marijuana. Skaggs from time to time also acted on behalf of the civilian authorities. Councilman was subsequently turned over to military authorities, and the court-martial proceedings here in issue were commenced. During all times relevant to the issues in this case, it is stipulated that Councilman was off-post, off-duty, and out of uniform, and that Skaggs was off-post and out of uniform, and although ostensibly off-duty, was in fact on duty in his capacity as an undercover agent.

In *Relford* v. *Commandant,* 401 U.S. 355, referred to by the trial court, the Supreme Court set forth twelve tests which it considered to be implicit from the holding in *O'Callahan* v. *Parker,* 395 U.S. 258. These standards are to be used in determining if offenses are "service connected." A review of the facts in the present case in the light of *Relford* reveals that only one of the standards or factors need be here considered. This one concerns whether the "victim" is engaged in a duty relating to the military. As to this element, we do not consider that Skaggs, alias Drees, was a "victim" in the ordinary sense. Also if the time of the offense is considered, Skaggs was not then engaged outwardly in the performance of any duty relating to the military. The opinion in *Relford* does not indicate that the Supreme Court had in mind this type of situation when it referred to a person performing military duties or to a "victim." The

Relford Court also added nine other factors that should be taken into consideration in arriving at a determination of whether a crime is sufficiently "service connected" so as to confer jurisdiction on a military court. These factors are enumerated at 401 U.S. 367, 369. As to these factors, the Government argues that because the alleged sale and transfer of marijuana was between two servicemen, and particularly here between an officer and an enlisted man, they have shown sufficient "service connection" to enable the military courts to assume jurisdiction over appellee. Of the nine factors, only one might be present here. This factor relates to the rank of the persons involved in the incident or the fact that both were servicemen.

It has been held that the off-base possession of marijuana by a serviceman is not "service connected." *Moylan* v. *Laird,* 305 F. Supp. 551 (D.R.I.). Neither is off-base use of marijuana. *Cole* v. *Laird,* 468 F. 2d 829 (5th Cir.). Nor is the off-base sale by a serviceman to a civilian. *United States* v. *Morley,* 20 USCMA 179. It has also been held that there is no "service connection" when a serviceman commits an off-duty, off-base, out of uniform offense against the dependents of another serviceman, *United States* v. *Henderson,* 18 USCMA 601, although the Court of Military Appeals has held that any offense by one serviceman against another, even if committed off-base, off-duty, and while the offender is in civilian

attire and unaware that his victim is the person or property of another serviceman, is sufficiently "service connected" to confer court-martial jurisdiction. *United States* v. *Camacho,* 19 USCMA 11.

We cannot agree that this sale or transfer of marijuana, as we previously said, involved any "victim," and it appears that "service connection" based on this theory is so remote as to be not at all within the meaning of that term as used by the Supreme Court in *O'Callahan* and *Relford.* See *United States* v. *Cook,* 19 USCMA 13; *Silvero* v. *Chief of Naval Air Basic Training,* 428 F. 2d 1009 (5th Cir.).

The requirement of indictment by a grand jury and the right to a jury trial are not forfeited by a person simply because he chooses, or is in some cases required, to serve his country as a member of the Armed Forces. These rights should be preserved to a serviceman insofar as possible without interfering with military discipline. In the instant case, there is no military connection with the crime other than the fact that Councilman and Skaggs were members of the Armed Forces. The commission of the crimes that appellee stands accused of affects military discipline no more than commission of any crime by any serviceman.

The trial court was correct in its determination that the military was without jurisdiction to proceed with the court-martial of Captain Councilman and in issuing the injunction.

Affirmed.

APPENDIX B

In the United States District Court for the Western District of Oklahoma

Civil No. 72-462

(Filed July 7, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FT. SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FT. SILL, OKLAHOMA, DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled case came on regularly for hearing before the Honorable Stephen S. Chandler, United States District Judge, the plaintiff, Bruce R. Councilman, appearing in person and by Nicholas D. Garrett and W. W. Godlove, and the defendants appearing by O. B. Johnston III, Assistant United States Attorney for the Western District of Oklahoma, Captain Charles W. Turnbaugh and Captain Perry M. Raymond, both of the Judge Advocate General Corps; and the parties having stipulated as to certain facts hereinafter enumerated, and each having submitted briefs, announced ready for the hearing, and the Court, being fully advised in the premises, finds:

STIPULATION OF FACTS

It was stipulated that Bruce R. Councilman, plaintiff in said cause, is a Captain on active duty in the United States Army and stationed at Ft. Sill, Oklahoma; that plaintiff is presently charged before an Army court-martial with three offenses under the Uniform Code of Military Justice, said offenses being:

1. Wrongful sale of marijuana to Specialist–4, Glenn D. Skaggs in Lawton, Oklahoma, on March 15, 1972, at 10:30 p.m.

2. Transfer of marijuana to Specialist–4, Glenn D Skaggs in Lawton, Oklahoma, on March 15, 1972, at 1:15 a.m.

3. Wrongful possession of marijuana at his apartment in Lawton, Oklahoma, on March 18, 1972.

It was further stipulated that the alleged offenses occurred in the civilian community of Lawton, Oklahoma, while plaintiff was off duty and out of uniform. Immediately following the search of his apartment in Lawton, Oklahoma, plaintiff was taken by the civilian and military authorities to the Lawton Police Department, where he was booked and later removed to Ft. Sill, Oklahoma.

That at all times the civilian courts were open for any one or more of the above charges to be filed.

The Court, for the purpose of this hearing, accepted as true the stipulation that Investigator Skaggs and Investigator Nelson, a CID agent, would testify that Skaggs was introduced to plaintiff, Bruce R. Councilman, in the apartment of Investigator Nelson, who had invited Bruce R. Councilman to attend, and at that time, according to the offered testimony of the defendants, Investigator Nelson introduced Investigator Skaggs as being a man by the name of Danny

Drees, a Specialist–4 Clerk in the Army training center at Ft. Sill, Oklahoma.

That Investigator Skaggs carried on his investigation of Bruce R. Councilman between the dates of March 10 and March 18, 1972. That at all times in his dealings with plaintiff herein, he was in civilian clothes, used the alias of Danny Drees, held himself out as a user of and dealer in marijuana.

That at all times subsequent thereto, Skaggs was used as an undercover agent in which numerous cases were filed by virtue of his activities involving both civilian and military personnel and that many of the military offenders apprehended for drug sales and transfers to Skaggs which occurred in the civilian community have been tried by civilian authorities, but that some have been tried by the military authorities.

That Motions were filed and presented to the presiding military judge of the court-martial proceedings to dismiss the charges against plaintiff because of the lack of jurisdiction of the military to try him in a court-martial proceeding, briefs were filed, evidence heard, and the Motion denied, and that the Court-martial proceeding was set for trial to begin at 9:00 a.m. on July 11, 1972.

CONCLUSIONS OF LAW

The Court, after having examined the Stipulation of Facts, together with oral stipulations above-referred to and having heard arguments of counsel, is of the opinion that the defendants, and each of them, lack jurisdiction to try the plaintiff for the above offenses. *James F. O'Callahan* v. *J. J. Parker,* 395 U.S. 258, 23 L.Ed. 291, 89 S. Ct. 1683 (1969); *Isiah Relford* v. *Commandant, U.S. Disciplinary Barracks,* 401 U.S.

355, 28 L.Ed. 2nd 102, 91 S. Ct. 649 (1971); *Moylan* v. *Laird*, 305 F. Supp. 551 (1969).

JUDGMENT

IT IS THEREFORE ORDERED AND DECREED that the defendants, and each of them, be and they are hereby permanently enjoined from proceeding further with the court-martial proceedings against plaintiff on the three above-named charges and specifications.

(S) Stephen S. Chandler,
STEPHEN S. CHANDLER,
United States District Judge.

Approved:

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,

(S) W. W. Godlove
W. W. GODLOVE,
Attorneys for Plaintiff,

(S) O. B. Johnston III
O. B. JOHNSTON III,
Assistant U.S. Attorney,

(S) Charles W. Turnbaugh
CAPT. CHARLES W. TURNBAUGH, JAGC

APPENDIX C

In the United States District Court for the Western District of Oklahoma

---

No. Civ–72–462

(Filed August 7, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

MEMORANDUM OPINION AND ORDER OVERRULING PETITION FOR RECONSIDERATION

On this 3rd day of August, 1972, upon consideration of Petition for Reconsideration with brief attached, the Court finds that on July 5, 1972, the plaintiff filed in this Court (1) Motion for Temporary Restraining Order praying for a temporary restraining order restraining defendants from subjecting the plaintiff to court-martial proceedings scheduled for July 11, 1972, upon the ground that immediate and irreparable injury, loss and damage would result; (2) Motion for Preliminary Injunction; (3) Affidavit in Support of Motion for Temporary Restraining Order; and (4) Briefs in support of the foregoing motions.

Upon presentation of said papers to the undersigned Judge of said Court, an *ex parte* temporary restraining order was denied and the defendants were notified by telephone and agreed to be present the following day at 10:00 o'clock a.m. for a hearing of the Motion for Preliminary Injunction, at which time the parties appeared and the attorneys for the defendants filed Brief in Opposition to the granting of the relief prayed for by the plaintiff.

The Court, having considered the Agreed Statement of Facts, arguments and admissions of counsel, entered findings of fact, conclusions of law and Judgment enjoining the defendants from proceeding further with the court-martial proceedings against plaintiff on the charges and specifications described in the findings of fact. The matter is now before the Court on the defendants' Petition for Reconsideration.

The Court is of the opinion that the four instruments denominated Motion for Temporary Restraining Order, Motion for Preliminary Injunction, Affidavit in Support of Motion for Temporary Restraining Order and Brief filed in support thereof, which were simultaneously filed by the plaintiff on the 5th day of July, 1972, in view of Rule 8(e), meet the requirements of a Complaint as contemplated by Rule 3, FRCP. As authorized by Rule 8(f) in order to do substantial justice, said instruments were considered by the Court as fully complying with Rule 3(a), FRCP. Had objection been raised by defendants at the hearing, said pleadings would have been conformed to the Rules and such an order is hereby entered *Nunc Pro Tunc* as authorized by Rule 15(b) FRCP.

The pleadings filed by the plaintiff fully apprised the defendants of the nature of the relief sought, were served on the defendants' counsel on the date filed, a

day prior to the hearing. The record shows that the defendants were quite familiar with the facts involved regarding which there was no controversy and that defendants were represented by Captain Charles W. Turnbaugh and Captain Perry M. Raymond of the Judge Advocate General Corps, and O. B. Johnston III, Assistant United States Attorney for the Western District of Oklahoma, who announced ready for the hearing, filed written brief and lucidly and skillfully presented the factual and legal propositions involved.

While the Court did not at the time specifically reform the pleadings by changing the titles thereof, they were considered by the Court and counsel for the parties as adequate although not denominated "Complaint". The facts involved and the relief sought were just as clear from the four-corners of the four instruments filed by the plaintiff as if they had been denominated "Complaint", and just as clearly invoked the jurisdiction of the Court and the Court coming to the conclusion that under the law it was necessary for him to enter an injunction against the defendants to prevent irreparable damage to the plaintiff, entered and filed forthwith an Order enjoining the defendants from proceeding further with the court-martial proceedings.

As to the contention of the defendants that plaintiff did not request a permanent injunction and that the Court granted a permanent injunction *sua sponte,* the Court is of the opinion that while the word "permanent" may be superfluous, as a matter of law it simply means that the injunction is permanent until set aside by an appellate court, and signifies that there would be no purpose in entering a Temporary Order since all of the facts involved were before the Court

and it would be useless to grant a Temporary Injunction and set the matter for further hearing on whether or not a Permanent Injunction should be entered, since no good purpose could be served thereby.

The Court sought to effect a just and speedy determination of the action which resulted in a simple, short and inexpensive record for appeal if the defendants wish to apply to an appellate court for relief from the entry of the extraordinary writ of prohibition, all in accordance with the mandate of Rule 1, FRCP.

The Petition for Reconsideration is therefore overruled.

(S) STEPHEN S. CHANDLER,
United States District Judge.

APPENDIX D

In the United States District Court for the Western District of Oklahoma

No. Civ-72-462

(Filed July 6, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

STIPULATION OF FACT

It is hereby stipulated by and between the plaintiff and the defendents that the following are true:

Bruce R. Councilman, plaintiff, is a captain on active duty in the US Army and stationed at Fort Sill, Oklahoma. The plaintiff is charged before an Army court-martial with three offenses under the Uniform Code of Military Justice:

(1) Wrongful sale of marihuana to Specialist Four Glenn D. Skaggs in Lawton, Oklahoma, at 10:30 p.m., 15 March 1972;

(2) Wrongful transfer of marihuana to Specialist Four Glenn D. Skaggs at 1:15 a.m., 15 March 1972, in Lawton, Oklahoma; and,

(3) Wrongful possession of marihuana at his apartment in Lawton, Oklahoma, on 18 March 1972.

The alleged offenses occurred in the civilian community of Lawton, Oklahoma, while the plaintiff was off duty and out of uniform.

From 10 March until 18 March 1972, Investigator Skaggs was acting as an undercover agent investigating the plaintiff and others and used the alias of Danny Drees. Skaggs has acted as an undercover agent in numerous cases involving both civilians and military personnel. Many of the military offenders apprehended for drug sales and transfers to Skaggs in the civilian community have been tried by the civilian authorities but some have been tried by the military authorities.

A motion was made to the presiding military judge to dismiss the charges against the plaintiff because of lack of jurisdiction. Briefs were accepted, evidence heard and the motion was denied. Trial on the merits is scheduled for 9:00 a.m., 11 July 1972.

Respectfully submitted.

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,
Attorney for Plaintiff,

(S) Bruce R. Councilman.

(S) O. B. Johnston
O. B. JOHNSTON,
Assistant U.S. Attorney for United States.

(S) Charles W. Turnbaugh
CHARLES W. TURNBAUGH, CPT., JAGC,
Attorney for United States, Defendant.

In the United States District Court for the Western District of Oklahoma

No. Civ-72-462

(Filed July 6, 1972)

BRUCE R. COUNCILMAN, PLAINTIFF

v.

MELVIN R. LAIRD, SECRETARY OF DEFENSE; ROBERT F. FROEHLKE, SECRETARY OF THE ARMY; MAJOR GENERAL R. WETHERILL, COMMANDING GENERAL OF FORT SILL, OKLAHOMA; AND MAJOR ARCHIBALD M. S. MCCOLL, STAFF JUDGE ADVOCATE OF FORT SILL, OKLAHOMA, DEFENDANTS

STIPULATION OF EXPECTED TESTIMONY

If US Army Criminal Investigator James Nelson and US Army Military Police Investigator Glenn D. Skaggs were present in court and sworn as witnesses, they would testify substantially as follows:

On 10 March 1972, Investigator Nelson, as part of a criminal investigation, held a party in Lawton, Oklahoma at which Investigator Skaggs and the plaintiff were present. Investigator Skaggs was introduced to the plaintiff by Nelson as Danny Drees, a Specialist Four clerk in the Army Training Center at Fort Sill, Oklahoma.

(S) Charles W. Turnbaugh
CHARLES W. TURNBAUGH,
Captain, JAGC,
Trial Counsel.

(S) Bruce R. Councilman
BRUCE R. COUNCILMAN,
Accused.

(S) Nicholas D. Garrett
NICHOLAS D. GARRETT,
Attorney for Plaintiff.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-662

JAMES R. SCHLESINGER, *et al.*,

Petitioners,

—v.—

BRUCE R. COUNCILMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, *AMICI CURIAE*

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I N D E X

Page

Interest of Amici Curiae 2

Questions Presented 3

Statement of the Case 4

Summary of Argument 6

ARGUMENT

I. POSSESSION BY A SERVICE MEMBER OF A SMALL AMOUNT OF MARIJUANA IN HIS PRIVATE CIVILIAN OFF-POST APARTMENT IS NOT A SERVICE-CONNECTED OFFENSE 8

II. SALE AND TRANSFER OF MARIJUANA BY A SERVICE MEMBER OFF-DUTY AND OFF-POST TO A MILITARY UNDERCOVER AGENT ARE NOT SERVICE-CONNECTED OFFENSES 20

III. THE DISTRICT COURT PROPERLY REFUSED TO DISMISS RESPONDENT'S ACTION FOR FAILURE TO EXHAUST IN-SERVICE CRIMINAL PROCEDURES 24

Conclusion 33

TABLE OF AUTHORITIES

Page

CASES:

Bullard Co. v. N.L.R.B.,
253 F. Supp. 391 (D.D.C. 1966).... 31

Cole v. Laird,
468 F.2d 829 (5th Cir. 1972)..... 14, 18

Glover v. United States,
286 F.2d 84 (8th Cir. 1961)..... 31

Grip v. Commanding Officer,
22 USCMA 668 (1973)..... 30

Guagliardo v. McElroy,
259 F.2d 927, (D.C. Cir. 1958),
aff'd 361 U.S. 281 (1960)..... 30

Gusik v. Schilder,
340 U.S. 178 (1950)..... 27

Hammond v. Lenfest,
398 F.2d 705 (2d Cir. 1968)..... 31

Holder v. Richardson,
364 F. Supp. 1207 (D.D.C. 1973)... 18,22

Lee v. Madigan,
358 U.S. 288 (1959)..... 26

Leedom v. Kyne,
358 U.S. 185 (1958)..... 31

Lichter v. United States,
334 U.S. 742 (1948)..... 31

Page

CASES:

Mascavage v. Lee,
Misc. No. 72-23 (C.O.M.A. May 16, 1973) 30

Mascavage v. Schlesinger,
(S. Ct. No. 73-1795)..... 3

McCulloch v. Sociedad Nacional,
372 U.S. 10 (1963)..... 31

McElroy v. Guagliardo,
361 U.S. 281 (1960)..... 25, 26

McKart v. United States,
395 U.S. 185 (1969)..... 31

NORML v. Wilson,
Civ. Act. 1897-73 (D.D.C. pending) 2, 15

Noyd v. Bond,
395 U.S. 683 (1969)..... 25, 26, 27

O'Callahan v. Parker,
395 U.S. 258 (1969)..... passim

Parisi v. Davidson,
405 U.S. 34 (1972)..... 31, 32

Rainville v. Lee,
22 USCMA 464 (1973)..... 30

Reid v. Covert,
354 U.S. 1 (1957)..... 25, 26

Relford v. Commandant,
401 U.S. 355 (1971)..... passim

Schroth v. Warner,
353 F. Supp. 1032 (1973)..... 23

Page

CASES:

Sedivy v. Richardson,
485 F.2d 1115, 1121 (3rd Cir. 1973) 32

Toth v. Quarles,
350 U.S. 11 (1955)..... 25, 26, 27

United States v. Adams,
1969, 19 USCMA 325, 24 C.M.R. 75... 18

United States v. Beeker,
18 USCMA 563, 40 C.M.R. 275 (1969). 14, 18, 28, 29

United States v. Clay,
1 USCMA 74, 1 C.M.R. 74..... 13

United States v. Fargnoli,
458 F.2d 1237 (1st Cir. 1972)..... 31

United States v. Lucas,
1 USCMA 19, 1 C.M.R. 19..... 13

United States v. Rose,
19 USCMA 3, 41 C.M.R. 28 (1969).... 29

United States v. Sexton,
23 USCMA 101, 48 C.M.R. 662 (1974). 8, 24, 29

United States v. Teasley,
22 USCMA 131, 46 C.M.R. 111 (1973). 29

United States v. Watson,
3 SSLR 3905 (1972)..... 14

United States v. Weinstein,
19 U.S. C.M.A. 29, 41 C.M.R. 29
(1969)..... 20

Page

CASE:

United States v. Williams,
8 USCMA 325 (1957)..... 12, 19

Wolff v. Selective Service Local Board No. 16,
372 F.2d 817, 825 (2d Cir. 1967)... 31

MISCELLANEOUS:

Article 39(a), 10 U.S.C. §839(a)..... 8

Article 51(c), Uniform Code of Military Justice, 10 U.S.C. § 851(c)..... 13

Article 134, 10 U.S.C. §934..... 4

In the Matter of the National Organization for the Reform of Marijuana Laws,
D.E.A. Docket No. 74-7 (1974)..... 2

Moyer, Justice and the Military (1972).. 10, 18, 28

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-662

JAMES R. SCHLESINGER,
ET AL.,

Petitioners,

v.

BRUCE R. COUNCILMAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS, AMICI CURIAE

This brief is submitted with the consent of all parties. Copies of the letters granting consent have been filed, in accordance with Rule 42(2), with the Clerk of the Court.

Interest of Amici Curiae

The National Organization for the Reform of Marijuana Laws (NORML) is a non-profit organization composed of more than ten thousand members, including many persons presently serving in the United States Armed Forces. NORML takes the public position that the personal possession and use of marijuana should be a matter of individual choice, and should not be subjected to criminal penalties.

NORML is involved in a number of law suits seeking reform of existing marijuana laws. The organization is a plaintiff in a civil action filed in the United States District Court for the District of Columbia seeking a declaratory judgment that the private possession and use of marijuana is constitutionally protected by the right of privacy. NORML v. Wilson (Civil Action No. 1897-73). It is also a petitioner in a proceeding before the Justice Department's Drug Enforcement Administration to reschedule marijuana in the Federal Controlled Substances Act. In the Matter of the National Organization for the Reform of Marijuana Laws, D.E.A. Docket No. 74-7.

The American Civil Liberties Union (ACLU), organized in 1920, is a national non-partisan association dedicated to the preservation and protection of individual civil liberties. Both the ACLU and its local affiliates have participated as amici curiae in numerous cases before this Court

involving civil rights and personal liberties and the ACLU has had a long-standing concern that constitutional protections be afforded to the nation's military personnel. Attorneys for the ACLU have recently filed a petition for a writ of certiorari to the District of Columbia Circuit in a case involving similar issues to those presented here. Mascavage v. Schlesinger, No. 73-1795, filed May 30, 1974. ACLU counsel have in addition represented service personnel in hundreds of cases in the military and the civilian courts, and submit this brief for the purpose of arguing that the great protections established by O'Callahan and Relford should not be dissipated.

Questions Presented

1. Whether possession by a serviceman of a small amount of marijuana in his private civilian off-post apartment is a service connected offense under O'Callahan v. Parker, 395 U.S. 258 (1969), and its progeny.

2. Whether sale and transfer of small amounts of marijuana by an off-duty, off-post serviceman to an undercover agent, who worked for both military and civilian authorities, are service-connected offenses.

3. Whether a federal district court must dismiss a request for injunctive relief directed to an impending court-martial proceeding on the ground that the service person has not exhausted all in-service criminal remedies.

Statement of the Case

Bruce R. Councilman, Respondent, is a Captain on active duty in the United States Army, stationed at Fort Sill, Oklahoma. Councilman has been charged by an Army court-martial with violation of Article 134 of the Uniform Code of Military Justice. 1/ The specifications allege (1) a transfer of two marijuana cigarettes to Glenn D. Skaggs on March 15, 1972; (2) a sale of approximately one-fifth of an ounce of marijuana to Glenn D. Skaggs later that same day; and (3) possession of less than one and one-half ounces of marijuana in his off-base apartment when it was searched on March 18, 1972.

The basis for these charges is set out in the Tenth Circuit's decision below:

> The facts, which are not in dispute, are as follows: The Army authorities were advised by a confidential informant that Councilman was using marijuana in his off-post apartment. Thereafter, at a party to which he was invited for that purpose, Captain Councilman was introduced to an undercover agent of the Army's Criminal Investigation Division, Specialist Four Glen D. Skaggs

---

1/ Article 134, one of the so-called General Articles, prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces." 10 U.S.C. §934.

Skaggs was using the name Danny Drees, and was introduced to Councilman as an Army clerk-typist, also stationed at Fort Sill. Thereafter, it is alleged that Councilman on one occasion transferred, and on another sold, small amounts of marijuana to Skaggs, alias Drees.

Based on Skaggs' investigation, Councilman was apprehended by civilian authorities, and a search of his apartment turned up a small quantity of marijuana. Skaggs from time to time also acted on behalf of the civilian authorities. Councilman was subsequently turned over to military authorities, and the court-martial proceedings here in issue were commenced. During all times relevant to the issues in this case, it is stipulated that Councilman was off-post, off-duty, and out of uniform, and that Skaggs was off-post and out of uniform, and although ostensibly off-duty, was in fact on duty in his capacity as an undercover agent.

On March 27, 1972 court-martial charges were brought against Councilman on the above-cited offenses of possession, transfer (by gift) and sale of marijuana. At a preliminary hearing, Councilman moved the presiding military judge to dismiss the charges on the ground that the offenses were not "service connected" under O'Callahan v. Parker, 395 U.S. 258 (1969). After holding an evidentiary hearing, the military judge

denied the request.

On July 5, 1972, Councilman brought an action in the United States District Court for the Western District of Oklahoma to enjoin his impending court-martial. The District Court found, after hearing, that the offenses were not service connected and on that basis enjoined the court-martial proceeding for lack of jurisdiction. The court's opinion and decision on request for rehearing were not reported and are found in Petitioners' Appendix. On appeal, the Court of Appeals for the Tenth Circuit uanimously affirmed the District Court. 481 F. 2d 613 (9th Cir. 1973). Certiorari was granted by this court on December 17, 1973.

Summary of Argument

A. Possession of small amounts of marijuana by a serviceman in his private civilian off-post apartment is not a service connected offense over which the military has court-martial jurisdiction. The great majority of the federal courts which have ruled upon the service-connection of marijuana possession in the civilian community have held it not to be service-connected. The reasoning of these cases should be followed by this Court, as it is fully consistent with the criteria set forth in O'Callahan v. Parker and Relford v. Commandant, 401 U.S. 355 (1971).

Furthermore, Petitioners' argument for service-connection relies almost exclusively

on the purported "severely detrimental" effect of marijuana possession on the military, assertions of harm unsupported by any evidence of record. Military jurisdiction should not be predicated on such a slender thread.

B. Neither a gratuitous transfer nor a sale of small amounts of marijuana by an off-duty, off-post serviceman to an undercover agent who functions for both military and civilian authorities is a service-connected offense. Such offenses have no impact upon any uniformed person other than the transferor and clearly do not directly affect the health, morale or fitness of any other member of the armed services. Here too the reasoning of O'Callahan and Relford are instructive.

C. The federal courts are not constrained by precedent or policy considerations from enjoining an impending court-martial on the ground that the military tribunal lacks jurisdiction to try the offense. This is so whether or not the accused service person has taken any preliminary action in the military to dismiss the case, for the exhaustion doctrine is properly applicable only where the federal court is deferring to another fact-finder's special expertise: on the issues here presented, the military courts have no special expertise. Applied to the present case, moreover, the argument against requiring further exhaustion is even more compelling. The Respondent unsuccessfully moved to dis-

miss the charges at a preliminary-type hearing convened by the military under Article 39(a), 10 U.S.C. §839(a), and any further resort to the military would be an exercise in futility in light of the decision of the Court of Military Appeals in United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974). There, the highest military tribunal expressly refused to follow the holdings of the trial and appellate courts in this very case, and held instead that off-post sales and transfers of marijuana to an undercover agent were service-connected offenses.

ARGUMENT

I.

POSSESSION BY A SERVICE MEMBER OF A SMALL AMOUNT OF MARIJUANA IN HIS PRIVATE CIVILIAN OFF-POST APARTMENT IS NOT A SERVICE-CONNECTED OFFENSE.

One of the offenses charged in the specifications against respondent is the possession of a small amount of marijuana (less than 1-1/2 ounces) in his apartment in the civilian community of Lawton, Oklahoma. This simply is not the type of offense for which military jurisdiction is permitted under O'Callahan v. Parker, 395 U.S. 258 (1969).

O'Callahan involved a Sergeant in the United States Army who had been charged and convicted by court-martial of a housebreaking, attempted rape, and assault with intent

to rape while he was properly absent from his military base. This Court held that the court-martial had lacked jurisdiction to try him for these offenses, and in so holding stressed several circumstances. It noted that O'Callahan was authorizedly absent from his military base when he committed the charged offenses, that there was no connection between his military duties and the crimes in question, that the crimes were not committed on a military post, that the person attacked was not performing any duties relating to the military, that the situs of the crime, Hawaii, was not an armed camp under military control, and that the offenses involved neither the flouting of military authority, the security of a post or the integrity of military property. Since the offense was committed within United States territorial limits, and the civilian courts were open, the Court could not find a basis for restricting access to these civilian courts. To the Court, offenses had to have a substantial "service connection" before the military courts could assume jurisdiction in place of the civilian tribunals before whom all other citizens were tried.

The historical underpinnings of O'Callahan are multiple and complex. Primarily, the Court expressed its concern with the absence in the court-martial context of procedural rights guaranteed as a matter of course to civilian defendants. 395 U.S. at 263-66. For this reason, as the

Court noted, "free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." Id. at 265. In addition to the disparity in procedural rights, this Court was acting in the light of a history of expansion of military subject matter jurisdiction far beyond the confines of the specialized requirements of the battlefield or the isolated Nineteenth Century post. See generally Moyer, Justice and the Military, §1-400 et seq. (1972). In essence, what had occurred was that the military authorities had come to assume that military courts were alternative appropriate forums in almost every instance where a service person was charged with commission of a crime.

Two years after O'Callahan, this Court decided Relford v. Commandant, 401 U.S. 355 (1971). Justice Blackmun, writing for the Court, reaffirmed the premise of O'Callahan that court-martial jurisdiction must be limited to the "least possible power adequate to the end proposed." 401 U.S. at 363. He went on to list twelve numbered and nine lettered factors which were to serve as criteria for determining whether or not an offense is service-connected. 401 U.S. at 365. The twelve numbered factors were: (1) the serviceman's proper absence from the base; (2) the crime's commission away from the base;

(3) its commission at a place not under military control; (4) its commission within our territorial limits and not in an occupied zone of a foreign country; (5) its commission in peacetime and its being unrelated to authority stemming from the war power; (6) the absence of any connection between the defendant's military duties and the crime; (7) the victim's not being engaged in the performance of any duty relating to the military; (8) the presence and availability of a civilian court in which the case can be prosecuted; (9) the absence of any flouting of military authority; (10) the absence of any threat to a military post; (11) the absence of any violation of military property; and (12) the offense being one which is traditionally prosecuted in civilian courts.

Turning to the marijuana possession charge in the present case, there is found each of the factors which point away from service-connection. Among other things, the crime occurred off-base, no military duties were being performed, and the offense is prosecuted every day in the civilian courts. Petitioners seemingly ignore these factors, however, and rest their case on the baseless assertion that possession of marijuana has a "disastrous" effect upon the performance of military duties. However, there is no support in Petitioners' brief, and no evidence below, to justify such an assertion. The Court of Military Appeals itself has held that

even a court-martial cannot assume, as a matter of law, that possession or use of a narcotic drug is prejudicial to army discipline. United States v. Williams, 8 USCMA 325 (1957). As the Court there summarized its decision:

> At no time was the court-martial instructed that it must find, in order to convict, that the accused's conduct was prejudicial to good order and discipline in the armed forces, or was of a nature to bring discredit on the armed forces.
>
> Before the board of review the Government took the position that the prejudicial character and service-discrediting nature of the offense charged was not an element and hence there was no need for the law officer to so instruct. In this Court the Government slightly altered its position and contended that wrongful use of narcotics is "as a matter of law" conduct prejudicial to good order and discipline and, accordingly, the court-martial need not be instructed that it must so find in order to convict. We are unimpressed with both arguments.
>
> * * *
>
> We are not unmindful of the disastrous effects occasioned by the wrongful use of narcotics on the health, morale and fitness for duty of persons in the

armed forces. However, we cannot ignore the Congressional intent manifested in the Code, supra, and the Manual for Courts-Martial, United States, 1951, that all elements of an offense be instructed upon by the law officer. Article 51(c), Uniform Code of Military Justice, 10 USC Sec. 851(c); paragraph 73, Manual, supra. United States v. Lucas, 1 USCMA 19, 1 CMR 19; United States v. Clay, 1 USCMA 74, 1 CMR 74. It is an element of the offense and must be instructed upon. The Government's contention that wrongful use of narcotics is prejudicial conduct as a matter of law would be equally applicable to practically every offense charged under the general Article. Accordingly, we hold that the law officer erred in failing to instruct the court that in order to find the accused guilty of the offense charged, it must find that under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. 8 USMCA at 326-27 (emphasis supplied).

It is the position of amici that the evidence concerning marijuana belies any assertion that its possession and use off-post and off-duty would adversely affect a serviceman's performance of his duties. This was the finding of a United States Army military judge in Fort Bliss, Texas in

United States v. Watson, 6 Crim. L. Reptr. 2377, 3 SSLR 3985 (1970). The judge there observed:

> The overwhelming weight of modern medical and scientific opinion, as presented to this court in testimony by Army medical officers, and the numerous exhibits offered by both sides, is to the effect that the use of marijuana--let alone mere possession--does not intrinsically have a 'disastrous effect' on the 'health, morale, and fitness for duty of persons in the armed forces.'
>
> The 'service connection' delineated by dicta of the Court of Military Appeals in[United States v.]Beeker,[18 USCMA 563, 40 CMR 275 (1969)] concerning off-post possession of marijuana rests solely upon the Court's misconception that marijuana be equated in its effects with habit-forming narcotic drugs. Inasmuch as the dicta in Beeker depends to this extent upon an incorrect factual premise, it can hardly justify a finding of 'service-connection' in an off-post marijuana possession situation like that alleged in the instant case.

To the same effect, the Court of Appeals for the Fifth Circuit in Cole v. Laird, 468 F.2d 829 (5th Cir. 1972), held that off-post possession of marijuana was not service-connected, and stated:

> It is clear that marijuana does not rise to the level of heroin or other physically addictive "hard" drugs and the dangers associated with its use--whatever they may be--are not as great as those associated with heroin and the like. 468 F.2d at 833.

Amici could cite other evidence in support of the proposition that marijuana use does not adversely affect service personnel. 2/ But the basic point is simply that Petitioners have failed in their burden to prove the contrary conclusion.

The military authorities had two opportunities to present evidence in support of this claim--first at the hearing before the presiding military judge on the service-connection question, and later at the hearing before the District Court on the same issue. As far as amici can determine, not one iota of evidence was ever introduced to support the conclusions drawn in the Petitioners' briefs. Jurisdiction to remove a citizen from the protections afforded by a civilian trial court, be it federal or state, cannot, under the teachings of O'Callahan and Rel-

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2/ See, e.g., the affidavits of Doctors Ungerleider and Grinspoon in NORML v. Wilson, Civ. Act. No. 1897-73, now pending in the United States District Court for the District of Columbia.

ford, rest on an unsubstantiated conclusion that a service connection exists.

In Relford, as we noted above, Justice Blackmun also listed certain lettered interests which if present, would strongly point to service-connection, 401 U.S. at 367-69. Significantly, none are present here: "(a) the essential and obvious interest of the military in the security of persons and of property on the military enclave . . .; (b) the responsibility of the military commander for maintenance of order in his command and his authority to maintain that order . . .; (c) the impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission . . .; (d) the conviction that Article I, Sec. 8, Clause 14, vesting in the Congress the power 'To make Rules for the Government and Regulation of the land and naval Forces,' means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish . . .;(e) the distinct possibility that civil courts, particularly non federal courts, will have less than complete interest, concern, and

capacity for all the cases that vindicate the military's disciplinary problems within its own community . . .; (f) the very positive implication in O'Callahan itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance; (g) the recognition in O'Callahan that, historically, a crime against the person of one associated with the post was subject even to the General Article . . .; (h) the mis-reading and undue restriction of O'Callahan if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in non-military criminal law; and (i) our inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a serviceman-defendant's on-duty and off-duty activities and hours on the post."

Applied to the present fact situation, it seems obvious that none of these interests are involved. Stripped to its essentials, the only "service-connection" in the case of off-post marijuana possession is the fact that the respondent is a service person.

The majority of federal trial and appellate courts which have decided the issue have reached the conclusion that off-post possession of marijuana is not service-

connected. See cases cited in Petitioners' Brief on the Merits, p. 14, n. 4, and Holder v. Richardson, 364 F. Supp. 1207 (D.D.C. 1973). The Court of Military Appeals has held, however, that the off-base possession and use of marijuana is service-connected because of the "disastrous effects" of marijuana "on the health, morale and fitness for duty of persons in the armed forces." United States v. Beeker, 18 USCMA 563, 565 40 CMR 275, 277 (1969). Petitioners repeatedly refer in their papers here to the "special competence" and "expertise" of the Court of Military Appeals in making this judgment. However, upon closer examination, it appears that the Court of Military Appeals did not consider any evidence or rely upon any sources in pronouncing the disastrous effects of marijuana in the Beeker case and its progeny. See also Moyer, Justice and the Military, supra, at 166. This was recognized by the Fifth Circuit in Cole v. Laird, supra, 468 F.2d at 832:

> Just what affirmative elements are necessary and sufficient to establish the requisite nexus between military and offense is not yet clear. The jurisdiction extends over the possession and use of marijuana or habit forming narcotics on the theory that the use of these items undermines the readiness of the fighting force. The theory was first expressed in dicta in United States v. Beeker, 1969, 18 U.S.C.M.A. 563, 40 C.M.R. 275. It was later accepted without analysis in United States v. Adams, 1969, 19 U.S.C.M.A. 325, 24 C.M.R. 75.

> The rationale which the Court of Military Appeals used to bolster this theory was enunciated in United States v. Williams, 1957, 8 U.S.C.M.A. 325, 24 C.M.R. 135. There, the Court of Military Appeals held that, notwithstanding its judicial notice of the 'possible disastrous effects . . . on the health, morale and fitness for duty of persons in the armed forces' of the use of habit forming narcotics, the panel members must be specifically charged to acquit unless they found that defendant's possession and use of drugs to be prejudicial to the good order and discipline of the service. Thus the Beeker Court's reliance on Williams was misplaced.

In sum, amici submit that neither the Petitioners here, the military in the proceedings below, or the military appellate tribunals considering the legal issue, have established that off-base possession of marijuana has a "disastrous effect on the health, morale, and fitness for duty of persons in the armed forces," or that it has any other effect on them whatever. Such an assumption without proof would in effect vitiate O'Callahan and abandon its interpretation to the military courts.

The petitioners assume without offering any evidence that marijuana use would cause "lower effectiveness" (Pet. Brief, p. 6). They further argue that if possession of

marijuana is not a service connected offense then effectiveness and equality of treatment would suffer when service people are stationed in "permissive states". This assertion is a non-sequitor for several reasons. There is now inequality between those service people stationed overseas and those stationed in the United States, for O'Callahan does not apply outside of the United States. United States v. Weinstein, 19 U.S. C.M.A. 29, 41 CMR 29 (1969). Many acts cognizable by courts martial if they occurred on base vary in their illegality from state to state, for example adultery and wrongful cohabitation under article 134, UCMJ, 10 U.S.C. 934.

II. SALE AND TRANSFER OF MARIJUANA BY A SERVICEMAN OFF-DUTY AND OFF-POST TO A MILITARY UNDERCOVER AGENT ARE NOT SERVICE-CONNECTED OFFENSES.

Respondent has been charged by court-martial with two transfers of marijuana to an undercover agent on the same day. The first transaction involved an alleged transfer by gift of two marijuana cigarettes. Later that same day, Respondent is alleged to have sold approximately one-fifth of an ounce of marijuana to the CID agent. As the Tenth Circuit pointed out:

> "During all times relevant to the issues in this case it is stipulated that Councilman was off-post, off-duty, and out of uniform, and although ostensibly off-duty, was in fact on duty in his

capacity as an undercover agent." Petitioners' Appendix A, at 11.

The main distinction between these alleged offenses and the simple possession of marijuana is that these offenses involve another serviceman. The Solicitor General argues that:

> "The impact of such an unlawful transaction goes far beyond the particular enlisted man who purchases the drug. Councilman knew that his status as an officer was known to Skaggs, and it is apparent that, in the tightly-knit, rumor-prone society of the military, word will usually circulate among the enlisted ranks concerning an officers' participation in such unlawfulness." Brief on the Merits, at 5 (emphasis supplied).

While amici question whether the military would accept this characterization of its "rumor-prone society," we cannot in any event see that this factor is involved where, as here, the enlisted man was an undercover military agent.

An important and obvious question is whether Skaggs could be considered a "victim" within the meaning of the seventh listed criterion in Relford. We think Relford and other decisions in its wake make clear that Skaggs cannot be regarded as such a victim. Relford involved the

rape of two women. The court there stated:

> The second victim, because of her duties at the post exchange, and because of the fact that her abduction and the attack upon her took place as she was returning to the PX at the end of a short and approved break in her work, was engaged in the performance of a duty relating to the military. 401 U.S. at 366.

No such finding was made regarding the first victim, though she was a sister of a serviceman at the base. Thus, it apparently is not enough that a victim be a member (or employee) of the military establishment in order to satisfy this criterion; instead, the person must also be engaged in a duty related to the military at the time of the crime. As Judge Green put it in Holder v. Richardson, 364 F. Supp. 1207 (1973), which also involved an off-base transaction in marijuana between members of the military service:

> "The sale of marijuana involves a victim. Hence the seventh element in the 12 elements outlined in Relford comes into play. The test is whether the victim was being engaged in the performance of a duty relating to the military at the time of the offense. In Relford, one victim was so engaged. She was returning to her job at the PX after an approved break. Although

> the victim in the case at bar was a member of the military service, it does not appear that she was engaged in a military service, it does not appear that she was engaged in a military duty at the time of the offense." 364 F. Supp. at 1211.

Judge Green concluded that the military authorities did not have jurisdiction over off-post, off-duty sales between servicemen.

Skaggs, alias Drees, the "victim" in the present proceedings, admittedly was a military member. Since he was an undercover agent assigned to buy the marijuana from Councilman, he could, arguendo, be considered to be engaged in a military duty. But see Schroth v. Warner, 353 F. Supp. 1032, 1044 (1973), which held that a military undercover agent "is not performing a function which has any special military significance." But even if this is a proper conclusion, for the Court to then hold that Skaggs was a military victim within the seventh criterion would be to permit the military to manufacture jurisdiction where none otherwise exists. Sale of marihuana to Skaggs could not conceivably have any effect on the health, morale, or fitness of any member of the armed services, and jurisdiction should not, per se, lie in the military courts. However, even if the "victim" was an ordinary serviceman, something more than mere status should be required by this Court to prove a service connection.

In United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974), the Court of Military Appeals refused to accept the holding of the court below in this case and concluded on similar facts that military jurisdiction was present. Although the court cited O'Callahan, it clearly did not follow this Court's mandate and relied upon no new findings or evidence or military expertise. Amici urge that the military authorities should not be allowed to "manufacture" jurisdiction for themselves by having intelligence agents pose as servicemen and make arrests for an off-base offense, which if it involved a civilian would clearly be outside military jurisdiction. This back-door approach to avoiding the import of the Supreme Court's decisions in O'Callahan and Relford, we submit, not only fails to recognize the constitutional import of those decisions, but also constitutes a direct assault upon the protections which this Court there sought to grant to service persons.

III.

THE DISTRICT COURT PROPERLY REFUSED TO DISMISS RESPONDENT'S ACTION FOR FAILURE TO EXHAUST IN-SERVICE CRIMINAL PROCEDURES.

In their brief on the jurisdictional issues, petitioners urge that respondent should have been required to exhaust his

military judicial remedies before seeking a federal court determination that the military courts lacked jurisdiction to try him for the charged offenses. For several reasons this argument is totally erroneous.

At the outset, we think it clear that the exhaustion doctrine, which is designed basically to ensure that a court defer consideration of issues which might in the first instance be better resolved by a knowledgeable administrative tribunal, simply has no place in the present context. A court-martial has no special expertise in reviewing its own jurisdiction, nor can it be expected to be an impartial, much less knowledgeable, analyst of the question. In Noyd v. Bond, 395 U.S. 683 (1969), this Court recognized the illogic of applying the exhaustion doctrine to jurisdictional challenges, and made clear that this result was no oversight; observing that neither exhaustion nor judicial abstention had been required in McElroy v. Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1960); and Toth v. Quarles, 350 U.S. 11 (1955), the Court went on:

> "The cited cases held that the Constitution barred the assertion of court-martial jurisdiction over various classes of civilians connected with the military, and it is true that this Court there vindicated complainant's claims without requiring exhaustion of military remedies. We did so, however, be-

> cause we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all. 395 U.S. 696, n. 6 (emphasis added).

Thus, in at least four instances, this Court has recognized that there is no question of exhaustion of remedies where an accused challenges the jurisdiction of a court-martial proceeding. See also Lee v. Madigan, 358 U.S. 288 (1959), aff'g. 148 F. Supp. 23 (1957).

The petitioners seek to distinguish McElroy, Reid and Toth on the ground that each involved the power to try civilians by court-martial, while Councilman is a serviceman. But the logic of those cases, as expressed in Noyd, is plainly applicable here; it is "especially unfair to require exhaustion of military remedies" where Councilman has "raised substantial arguments denying the right of the military to try [him] at all." Likewise, the relative expertise of civilian and military courts in determining the impact on military administration and discipline can be little different in the present case than in the case of a military dependant accused of killing her serviceman husband (Reid), or

in that of a former serviceman accused of committing crimes overseas before his discharge (Toth).

Amici would observe that there are no policy considerations for not bypassing the military courts when the issues are jurisdictional in nature. This Court in the Noyd excerpt cited above recognized the lack of any special expertise in the military judicial structure on such issues. While it is true that "special preference" is afforded by the federal courts to certain military court decisions, see Gusik v. Schilder, 340 U.S. 128 (1950), this deference stems not from any inherent sovereignty in the military, but from a concern for the effect of judicial intervention on military discipline, and from a desire to avoid involvement with technical provisions of the Uniform Code of Military Justice, Noyd v. Bond, supra, 395 U.S. at 696. O'Callahan type claims, by definition, are not within the proper scope of military concerns; they stem from the Constitution and from federal case law rather than the military's own principles of jurisprudence. And surely a federal district court is fully capable of making a factual determination on the twelve Relford factors as they relate to any individual set of circumstances.

The petitioners make much of the purported "interference with the jurisdiction of other judicial systems" which would assertedly result if the decisions of the

court below were affirmed, but in fact, there would be no such interference, because there is no jurisdiction in the military to try Councilman at all. Thus, there is no substance to the petitioners' claim that the district court lacked jurisdiction to "review" a determination by a court-martial, when it is not "review" which the respondent sought, but an order which would prevent the court-martial process from beginning at all, because it lacked any jurisdiction over him at all. The military, however, has sought to subject Councilman to what this Court recognized in O'Callahan, 395 U.S. at 266, is the irreparable injury of trial by court-martial itself, in a system without provision for bail pending trial and appeals, and without numerous other protections routinely available in a civilian trial. See Moyer, JUSTICE AND THE MILITARY, at 407-408 (1972). This assertion of court-martial jurisdiction is based not on the vaunted "expertise" and careful fact-finding of the military justice system, of which the petitioners make so much; it is based rather on a casual, offhand elevation by the Court of Military Appeals of unfounded fable into "facts" worthy of judicial notice. United States v. Beeker, 18 USCMA 563, 40 CMR 275 (1969). Nor, significantly, do petitioners anywhere in their brief give to this Court even an inkling of the type of additional facts which, they repeatedly suggest, were not sufficiently developed either in the Article 32 hearing, or in the district court.

There is another independent reason for not requiring the application of the exhaustion doctrine to the case at bar. Exhaustion has never been required where the criminal defendant would simply be engaging in an exercise in futility. The military courts have established an iron clad rule that use of drugs by a service person and the delivery of drugs by one service person to another is always service-connected. United States v. Rose, 19 USCMA 3, 41 CMR 28 (1969); United States v. Beeker, 18 USC MA 563, 40 CMR 275 (1969); United States v. Teasley, 22 USCMA 131, 46 CMR 111 (1973). It would be less than realistic to expect the military appellate tribunals to embark upon an ad hoc or case by case approach to this problem as dictated by Relford v. Commandant, supra. And in United States v. Sexton, 23 USCMA 101, 48 CMR 662 (1974) the Court of Military Appeals expressly rejected the logic and holding of the court below and held that the off-post sales and transfers of marijuana to an undercover agent were service-connected offenses. Thus, there is no question but that respondent is precluded from any chance of success in presenting his jurisdictional arguments before a military court. 3/

3/ In the event that a military person in respondent's position should be required to exhaust military remedies, we would urge that respondent has in fact exhausted his

Petitioners' "concession" that any effort by Councilman to resort to other military judicial remedies, such as appeal or extraordinary relief in the Court of Military Appeals, "would probably have been unsuccessful" is plainly far short of the mark; the latter court's decisions make abundantly clear that any such effort by an accused would be a hopeless and ineffective act.

> ". . . [T]he highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as appellant. Appellant should not be required to await a similar decision in his case." Guagliardo v. McElroy, 259 F.2d 927, at 929, fn. 4 (D.C.Cir. 1958), aff'd 361 U.S. 281 (1960).

While the judge-made doctrine of exhaustion may be appropriate, where other remedies indeed hold out hope of relief,

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only available remedy by raising the issue in the course of an Article 39(a) hearing. The Court of Military Appeals has repeatedly refused to authorize extraordinary writs to examine jurisdiction in the case of off-post narcotics offenses. See Grip v. Commanding Officer, 22 USCMA 668 (1973); Rainville v. Lee, 22 USCMA 464 (1973); Mascavage v. Lee, Misc. No. 72-23 (C.O.M.A. May 16, 1973).

the courts have consistently recognized that "when there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the administrative ruling is great, the courts have not been reluctant to disregard this doctrine. See McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963); Leedom v. Kyne, 358 U.S. 185 (1958); Lichter v. United States, 334 U.S. 742 (1948); Glover v. United States, 286 F.2d 84 (8th Cir. 1961); Bullard Co. v. N.L.R.B., 253 F. Supp. 391 (D.D.C. 1966)." Wolff v. Selective Service Local Board No. 16, 372 F.2d 817, 825 (2d Cir. 1967)(Medina, J.). See also, e.g., McKart v. United States, 395 U.S. 185 (1969) United States v. Fargnoli, 458 F.2d 1237 (1st Cir. 1972); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968). 4/

4/ This Court reached a similar result in Parisi v. Davidson, 405 U.S. 34 (1972), where petitioner had sought habeas corpus review of the military's denial of his application for discharge as a conscientious objector. The government insisted that Parisi should be required to exhaust his military remedies,by asserting the wrongful denial of his conscientious objector claim as a defense to his pending court-martial for disobedience of orders, and by applying to the Court of Military Appeals for a writ of habeas corpus to obtain his discharge. This Court held, however, that earlier de-

The courts which have rules contrary to Respondent's position have rested their decisions in part on the assertion --or the expectation-- that a military defendant might have presented to the military courts all of the facts in support of his or her claim that the alleged offense was not service-connected, and therefore not subject to court-martial jurisdiction. See, e.g., Sedivy v. Richardson, 485 F.2d 1115, 1121 (3rd Cir. 1973). However, where the Court of Military Appeals has repeatedly held that any possession of drugs is a service-connected offense it is plainly questionable whether an accused would have an opportunity to present evidence on the location and other circumstances of the offense -- evidence which the military courts would consider totally irrelevant. By the time the military justice system had run its course, Respondent was able to commence a post-conviction, post-military appellate exhaustion habeas corpus proceeding, the relevant evidence might well be lost or otherwise unobtainable.

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cisions of the Court of Military Appeals had rendered it at best dubious whether the court-martial defense would be recognized, while the Court of Military Appeals' statutory jurisdiction to grant the suggested habeas corpus relief was equally questionable; therefore, the Parisi Court held, the petitioner could not "properly be required to exhaust a remedy which may not exist." 405 U.S. at 45.

CONCLUSION

For the reasons set forth herein, amici urge this Court to affirm the holding of the Tenth Circuit that the offenses charged against Respondent were not service-connected and that, therefore, the military lacked jurisdiction to try the offense. In the alternative, amici believe this case should be remanded to the District Court for an evidentiary hearing on the service-connection issue, at which time the military authorities may attempt again to support the premise that marijuana has such a "severely detrimental" effect upon the military, that any off-base possession and/or transfer of the substance by a service person should be considered to be service connected within the meaning of the prior decisions of this Court.

Respectfully submitted,

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November 1974

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* COUNCILMAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73-662. Argued December 10, 1974—Decided March 25, 1975

After court-martial charges were preferred against respondent Army captain for the sale, transfer, and possession of marihuana, he brought suit in Federal District Court to enjoin petitioner military authorities from proceeding with the court-martial. The District Court granted a permanent injunction, and the Court of Appeals affirmed, on the ground that the offenses charged were not "service connected" and hence were not within court-martial jurisdiction. Petitioners contend in this Court (1) that any federal-question jurisdiction that the District Court might have had under 28 U. S. C. § 1331 had been removed by Art. 76 of the Uniform Code of Military Justice (UCMJ), which provides that court-martial proceedings "are final and conclusive" and that "all action taken pursuant to those proceedings [is] binding upon all . . . courts of the United States," and (2) that the District Court improperly intervened in a pending court-martial proceeding. *Held:*

1. Article 76 does not stand as a jurisdictional bar to respondent's suit, and the District Court had subject-matter jurisdiction under 28 U. S. C. § 1331, assuming the requisite jurisdictional amount. Pp. 5–15.

(a) The general rule that "the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civilian courts, by writ of prohibition or otherwise," *Smith* v. *Whitney*, 116 U. S. 167, 177, is subject to its own qualification that the court-martial's acts be "within the scope of its jurisdiction and duty," and hence collateral relief from the consequences of a court-martial judgment is not barred if the judgment was void. Pp. 7–10.

Syllabus

(b) The finality clause of Art. 76 does no more than describe the terminal point for proceedings within the court-martial system, *Gusik* v. *Schilder*, 340 U. S. 128, and the legislative history of the article does not support a conclusion that it was intended to confine collateral attack on court-martial proceedings in Art. III courts exclusively to habeas corpus. Pp. 10–15.

2. When a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise. There is nothing in the circumstances of this case to outweigh the strong considerations favoring exhaustion of remedies within the military court system or to warrant intruding on the integrity of military court processes, which were enacted by Congress in the UCMJ in an attempt to balance the unique necessities of the military system against the equally significant interest of ensuring fairness to servicemen charged with military offenses. Pp. 15–22.

481 F. 2d 613, reversed.

POWELL, J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined, and in Part II of which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined. BURGER, C. J., filed a separate statement concurring in the judgment. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-662

James R. Schlesinger et al., Petitioners, v. Bruce R. Councilman. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March 25, 1975]

MR. JUSTICE POWELL delivered the opinion of the Court.

On March 27, 1972, court-martial charges were preferred against respondent Bruce R. Councilman, an Army captain on active duty at Fort Sill, Oklahoma. The charges alleged that Captain Councilman had wrongfully sold, transferred and possessed marihuana. On July 6, 1972, the District Court for the Western District of Oklahoma permanently enjoined petitioners, the Secretaries of Defense and of the Army and the Commanding General and Staff Judge Advocate of Fort Sill, from proceeding with Captain Councilman's impending court-martial. On appeal, the Court of Appeals for the Tenth Circuit affirmed, holding that the offenses with which Captain Councilman had been charged were not "service connected" and therefore not within the military court-martial jurisdiction. 481 F. 2d 613 (1973).

The judgments of the District Court and the Court of Appeals were predicated on certain assumptions, not hitherto examined by this Court,[1] concerning the proper relationship between the military justice system established by Congress and the powers and responsi-

[1] See *Secretary of the Navy* v. *Avrech*, 418 U. S. 676 (1974).

bilities of Art. III courts. In the view we take of the matter, the case presents no occasion for resolution of the merits of Councilman's "service-connection" claim. Although the District Court may have had subject matter jurisdiction, we think that the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings. We see nothing in the circumstances of this case that alters this general equitable balance. Accordingly, we reverse.

I

The parties in the District Court stipulated the relevant facts.[2] They need only be summarized here. The Army's Criminal Investigation Detachment at Fort Sill received information from a confidential informant that Councilman was using marihuana at his off-post apartment. The Detachment arranged to have Councilman invited to an off-post party, where he was introduced to Specialist Four Glenn D. Skaggs, an enlisted man working as a Detachment undercover agent. Skaggs, who used the name Danny Drees in his undercover activities, was identified as an enlisted clerk-typist at the Fort Sill Army Training Center. Shortly after their initial meeting, Councilman allegedly transferred to Skaggs small quantities of marihuana, once by sale and once by gift. On both occasions, Councilman and Skaggs were off post and not in uniform. Councilman was off duty and, to all appearances, Skaggs was off duty as well. Thereafter, based on Skaggs' investigations, Councilman was apprehended by civilian authorities, who searched his apartment and discovered additional quantities of marihuana. Councilman later was remanded to military authorities. He was charged with having violated Art. 134 of the Uni-

[2] Pet. App. E, 23–25.

form Code of Military Justice [3] by wrongfully selling, transferring and possessing marihuana. Following an investigatory hearing,[4] the charges were referred to a general court-martial for trial.

At a preliminary hearing held on June 27, 1972, Councilman represented by counsel, moved to dismiss the charges, contending that the court-martial lacked jurisdiction under this Court's decision in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), because the alleged offenses were not "service-connected." After an evidentiary hearing, the presiding military judge denied the motion and scheduled the court-martial to begin on July 11. On July 5th, Councilman brought this action in the District Court, moving for a temporary restraining order and a preliminary injunction to prevent his impending court-martial. Councilman claimed that since the court-martial lacked jurisdiction over the alleged offenses, he "[would] suffer great and irreparable damage in that he [might] be deprived of his liberty without due process of law, if the Court-Martial Proceedings are permitted on July 11 . . . ." On the following day, after a hearing on the service-connection issue, the District Court permanently enjoined the military authorities from proceeding with the court-martial.[5]

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[3] 10 U. S. C. § 934. The Article prohibits, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed services." This provision was upheld last Term as against vagueness and First Amendment overbreadth challenges. *Parker* v. *Levy*, 417 U. S. 733 (1974); *Secretary of the Navy* v. *Avrech*, 418 U. S. 676 (1974). No similar challenge is repeated here.

[4] See U. C. M. J. Art. 32, 10 U. S. C. § 832.

[5] The District Court subsequently denied the military authorities' petition for reconsideration, in which petitioners argued that because Councilman had not filed a complaint to institute the action as required by Fed. Rule Civ. Proc. 3, the court lacked jurisdiction to act. The District Court concluded that the papers filed by Councilman—motions for a temporary restraining order and a pre-

The Court of Appeals affirmed, holding that the alleged offenses did not meet the tests for service-connection set forth in *O'Callahan* v. *Parker*, *supra*, and elaborated in *Relford* v. *United States Disciplinary Commandant*, 401 U. S. 355 (1971). The court found that only one of the factors enumerated in those decisions pointed to service-connection in this case: the "factor relat[ing] to the rank of the persons involved in the incident or the fact that both were servicemen." 481 F. 2d, at 614. The court concluded that this factor, standing alone, was insufficient to sustain court-martial jurisdiction and that Councilman's possession and distribution of marihuana "affect[ed] military discipline no more than commission of any crime by any servicemen." *Id.*, at 615.

On behalf of the military authorities, the Solicitor General filed a petition for a writ of certiorari addressed to the "service-connected" offense issue,[6] and noting the existence of conflicts on this issue between the decision below and decisions of the Court of Military Appeals.[7]

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liminary injunction, and supporting affidavit and briefs—although not formally denominated a complaint, were adequate to apprise petitioners of the nature of the claim and the relief sought and to invoke the jurisdiction of the court. The court stated that, as authorized by Fed. Rule Civ. Proc. 8 (f), it deemed the papers sufficient to comply with Rule 3 (a), and entered an order *nunc pro tunc*, under Fed. Rule Civ. Proc. 15 (b), conforming the pleadings to the rules. Petitioners have raised no objection to this disposition of the matter. We think that so long as the court's subject matter jurisdiction actually existed and adequately appeared to exist from the papers filed, see n. 9, *infra*, any defect in the manner in which the action was instituted and processed is not itself jurisdictional and does not prevent entry of a valid judgment. See 2 J. Moore, Federal Practice, ¶ 3.04, at 718–720, ¶ 3.06 [1], at 731–732 (2d ed. 1974).

[6] Pet., at 2.

[7] *E. g.*, *United States* v. *Castro*, 18 U. S. C. M. A. 598, 40 C. M. R. 310 (1969); *United States* v. *Adams*, 19 U. S. C. M. A. 75, 41 C. M. R. 75 (1969) (off-post possession of marihuana or illegal

We granted the petition, 414 U. S. 1111 (1973),[8] and although normally we do not consider questions raised neither below nor in the petition, see *United States* v. *Richardson*, 418 U. S. 166, 216 (1974) (STEWART, J., dissenting), the jurisdictional and equity issues necessarily implicit in this case seemed sufficiently important to raise them *sua sponte*. See, *e. g.*, *Younger* v. *Harris*, 401 U. S. 37, 40 (1971); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927), and cases there cited. We therefore requested supplemental briefs "on the issues of (1) the jurisdiction of the District Court, (2) exhaustion of remedies, and (3) the propriety of a federal district court enjoining a pending court martial proceeding." Since our resolution of these issues disposes of the case, we express no opinion on the "service-connection" question.

II

Presumably the District Court found jurisdiction under 28 U. S. C. § 1331,[9] which grants subject-matter jurisdiction of civil actions where the matter in controversy exceeds "$10,000 and arises under the Constitution, laws or treaties of the United States." No contention is made

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narcotics held service-connected); *United States* v. *Rose*, 19 U. S. C. M. A. 3, 41 C. M. R. 3 (1969) (unlawful sale of barbiturates off-post by one serviceman to another held service-connected). See *Cole* v. *Laird*, 468 F. 2d 829 (CA5 1972) (holding use of marihuana by a serviceman off post and off duty not service-connected); *Moylan* v. *Laird*, 305 F. Supp. 551 (R. I. 1969); *Lyle* v. *Kincaid*, 344 F. Supp. 223 (MD Fla. 1972); *Schroth* v. *Warner*, 353 F. Supp. 1032 (Hawaii 1973); *Redmond* v. *Warner*, 355 F. Supp. 812 (Hawaii 1973) (holding that the military lacks jurisdiction over off-post drug offenses). Contra: *Scott* v. *Schlesinger*, No. C. A. 4-2371 (ND Tex. Oct. 1, 1973) (off-post sales of marihuana to servicemen held service-connected).

[8] Title 28 U. S. C. § 1254 (1).

[9] The "complaint" filed in the District Court, see n. 5, *supra*, nowhere mentioned § 1331 nor alleged the requisite amount in contro-

that respondent's claim fails to assert a case arising under the Constitution. See *O'Callahan* v. *Parker*, *supra*. Petitioners argue, however, that even if the District Court might otherwise have had jurisdiction under § 1331, this was removed by enactment of Art. 76 of the Uniform Code of Military Justice, 10 U. S. C. § 876. That article, set forth in the margin,[10] provides in pertinent part that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter . . . are final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all . . . courts of the United States . . . ."

Petitioners rely on the legislative history of Art. 76

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versy. The facts alleged and the claim asserted nonetheless were sufficient to demonstrate the existence of a federal question. See C. Wright, Law of Federal Courts 290–291 (1970). And although a complaint under § 1331 is fatally defective unless it contains a proper allegation of the amount in controversy, see, *e. g.*, *Canadian Indemnity Co.* v. *Republic Indemnity Co.*, 222 F. 2d 601 (CA9 1955), respondent now claims that the matter in controversy does exceed the requisite amount. Brief of Respondent on the Jurisdictional Issues, at 4–5. Defective allegations of jurisdiction may be amended, 28 U. S. C. § 1653. In view of our disposition of the case, however, no purpose would be served by requiring a formal amendment at this stage.

[10] "The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

as demonstrating that Congress intended to limit collateral attack in civilian courts on court-martial convictions to proceedings for writs of habeas corpus under 28 U. S. C. § 2241. If this is so, petitioners further argue that Congress must have intended to remove any jurisdiction the civilian courts might otherwise have had to intervene before the court-martial has taken place. In short, it is argued that with respect to court-martial proceedings and convictions, Art. 76 acts as a *pro tanto* repealer of § 1331 and all other statutes, with the exception of § 2241, conferring subject-matter jurisdiction on Art. III courts.

We have declined to decide this question in the past.[11] We now conclude that although the article is highly relevant to the proper scope of collateral attack on court-martial convictions and to the propriety of equitable intervention into pending court-martial proceedings, it does not have the jurisdictional consequences petitioners ascribe to it.

A

This Court repeatedly has recognized that, of necessity, "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953); *Parker* v. *Levy*, 417 U. S. 733, 744 (1974). Congress is empowered under Art. I, § 8, to "make Rules for the Government and Regulation of the land and naval Forces." It has, however, never deemed it appropriate to confer on this Court "appellate jurisdiction to supervise the administration of criminal justice in the military." *Noyd* v. *Bond*, 395 U. S. 683, 694–695

[11] *United States* v. *Augenblick*, 393 U. S. 348, 349–353 (1969); *Avrech* v. *Secretary of the Navy*, *supra*. Cf. *Warner* v. *Flemings*, decided *sub nom. Gosa* v. *Mayden*, 413 U. S. 665 (1973).

(1969). See *Ex parte Vallandigham*, 68 U. S. (1 Wall.) 243, 249–253 (1864).[12] Nor has Congress conferred on any Art. III court jurisdiction directly to review court-martial determinations. The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have res judicata effect and preclude further litigation of the merits. See, *e. g.*, 1B J. Moore, Federal Practice, ¶ 0.405, at 634–637 (2d ed. 1970). This Court therefore has adhered uniformly to "the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civilian courts, by writ of prohibition or otherwise." *Smith* v. *Whitney*, 116 U. S. 167, 177 (1886). See *Hiatt* v. *Brown*, 339 U. S. 103, 111 (1950); *In re Grimley*, 137 U. S. 147, 150 (1890).

But this general rule carries with it its own qualification—that the court-martial's acts be "within the scope of its jurisdiction and duty." Collateral attack seeks, as a necessary incident to relief otherwise within the court's power to grant, a declaration that a judgment is void.[13] A judgment, however, is not rendered void merely by error, nor does the granting of collateral relief necessarily mean that the judgment is invalid for all purposes.[14] On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some

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[12] See also *In re Yamashita*, 327 U. S. 1, 8 (1946); *In re Vidal*, 179 U. S. 126 (1900). Cf. *United States* v. *Crawford*, 380 U. S. 970 (1964) (motion for leave to file petition for writ of certiorari to Court of Military Appeals denied).

[13] Restatement, Judgments § 11 (1942); F. James, Jr., Civil Procedure § 11.5 (1965). Compare *Ashe* v. *McNamara*, 355 F. 2d 496 (CA1 1965), with *Davies* v. *Clifford*, 393 F. 2d 496 (CA1 1968).

[14] See *Fay* v. *Noia*, 372 U. S. 391, 423–424 (1963).

other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences.

These settled principles of the law of judgments have been held from the start fully applicable to court-martial determinations.[15] Habeas corpus proceedings have been and remain by far the most common form of collateral attack on court-martial judgments; but historically they have not been the exclusive means of collateral attack. Nor were they the earliest. In *Wise* v. *Withers*, 7 U. S. (3 Cranch) 331 (1806), an action for trespass against a collector of court-martial fines, the Court held that the plaintiff, a federal official, was exempt from military duty and that the court-martial lacked jurisdiction. The Court concluded that "it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it." *Id.*, at 337. See *Dynes* v. *Hoover*, 61 U. S. (20 Harv.) 65 (1857); *Morton* v. *Mott*, 25 U. S. (12 Wheat.) 19 (1827).[16] At the end of the last century, on the basis of the same principle the Court approved collateral attack in the form of backpay suits in the Court of Claims. *E. g.*, *Runkle* v. *United States*, 122 U. S. 543 (1887). These cases, and the early military habeas cases,[17] demonstrate a uniform approach to the problem of collateral relief

[15] See generally Weckstein, Federal Court Review of Courts-Martial Proceedings: A Delicate Balance of Individual Rights and Military Responsibilities, 54 Mil. L. Rev. 1 (1971); Bishop, Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions, 61 Col. L. Rev. 40 (1961).

[16] In *Dynes*, the Court stated:

"Persons, then, belonging to the army and navy are not subject to illegal or irresponsible courts-martial . . . . In such cases everything which may be done is void—not voidable, but void; and civil courts have never failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment."

61 U. S. (20 How.), at 81.

[17] *E. g.*, *Ex parte Reed*, 100 U. S. 13 (1879).

from the consequences of court-martial judgments: such relief was barred unless it appeared that the judgments were void.[18]

B

Petitioners argue that Art. 76 effected a change in this regime, not solely as a matter of the law of judgments, but as a matter of jurisdiction. This case, of course, does not concern a collateral attack on a court-martial judgment, at least in the normal sense, since there was no judgment to attack. Instead, Councilman, alleging the likelihood of irreparable injury, sought injunctive relief from an impending court-martial. He asserted, as the basis for such relief, that any judgment entered by the court-martial would be void and hence subject to collateral impeachment, at least by way of habeas. *E. g.*, *O'Callahan* v. *Parker*, *supra*. Thus, the legal basis on which Councilman rested his claim for equitable relief did not go beyond recognized grounds for collateral attack.[19] In effect, Councilman is attempting to attack collaterally the military authorities' decision to convene the court-martial and the refusal of the military judge

[18] See, *e. g.*, *McClaughry v. Deming*, 186 U. S. 49 (1902) (habeas corpus); and *United States* v. *Brown*, 206 U. S. 240 (1907) (backpay suit). In *Wales* v. *Whitney*, 114 U. S. 564 (1885), the Court refused to consider a habeas corpus attack on the jurisdiction of a pending court-martial proceeding because the petitioner was not in custody. The Court, however, observed that

"if that court finds him guilty, and imposes imprisonment as a part of a sentence, he can then have a writ to relieve him of his imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction . . . ." *Id.*, at 575.

[19] If it had, Councilman's suit would have been a species of pre-judgment direct attack, in which case the District Court would have had no jurisdiction whatever.

to dismiss the charges. Art. 76, however, gives binding effect not only to court-martial judgments, but also to "all actions taken pursuant to those proceedings . . . ." We therefore agree with petitioners that, as a jurisdictional matter, Councilman's suit stands on precisely the same footing as possible post-judgment forms of collateral relief. If Art. 76 was intended to bar subject-matter jurisdiction in suits for collateral relief other than by way of habeas, it also must remove § 1331 jurisdiction prior to any court-martial judgment.

Article 76, however, does not expressly effect any change in the subject-matter jurisdiction of Art. III courts. Its language only defines the point at which military court judgments become final and requires that they be given res judicata effect. But, as the Court has recognized in the past, there is no necessary inconsistency between this and the standard rule that void judgments, although final for purposes of direct review, may be impeached collaterally in suits otherwise within a court's subject-matter jurisdiction.[20] In *Gusik* v. *Schilder*, 340 U. S. 128 (1940), this Court was required to determine the effect on military habeas proceedings of Art. 53 of the Articles of War, the immediate statutory predecessor of the present Art. 76, containing identical finality language.[21] Petitioner had argued that Art. 53 deprived civilian courts of all jurisdiction to entertain suits collaterally attacking military court judgments, and thus worked an unconstitutional suspension of the writ of habeas corpus. The Court declined to give the Article the suggested construction:

> "We read the finality clause of Article 53 as doing no more than describing the terminal point for proceedings within the court-martial system. If Con-

[20] See, *e. g.*, *Weckstein*, *supra*, n. 15, at 12.

[21] 62 Stat. 637.

gress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been made plain and unmistakable. The finality language so adequately serves the more restricted purpose that we would have to give a strained construction in order to stir the constitutional issue that is tendered." *Id.*, at 127–128.

Petitioners agree with *Gusik* insofar as it holds that habeas corpus remains available despite the mandate of Art. 76. It is argued, however, both from the legislative history of Art. 76 itself and from the judgment implicit in the establishment of a comprehensive system of review within the military, that Congress intended to confine collateral attack in Art. III courts exclusively to habeas corpus. In doing so, it is said, Congress was acknowledging the special constitutional status of that writ under the Suspension Clause,[22] a status shared by no other form of collateral relief. Petitioners point in particular to statements in the House and Senate Committee reports that "[s]ubject only to a petition for a writ of habeas corpus in Federal Court, [Article 76] provides for the finality of court-martial proceedings and judgments." [23] In addition, the House Committee Report explained that the Court of Military Appeals, established by the Code, was intended as "the court of last resort for court-martial cases, except for the constitutional right of habeas corpus." [24]

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[22] Constitution of the United States, Art. I, § 9. Cf. *In re Yamashita*, 329 U. S. 1, 8 (1946); *Fay* v. *Noia*, 373 U. S. 391, 399–400 (1965).

[23] S. Rep. No. 486, 81st Cong., 1st Sess., at 32 (1949); H. R. Rep. No. 491, 81st Cong., 1st Sess., at 35 (1949).

[24] H. R. Rep. No. 491, *supra*, at 7. See also 95 Cong. Rec. 5721 (remarks of Rep. Brooks). It had been suggested in committee hearings that any restriction on the availability of habeas corpus would involve constitutional problems. Hearings on H. R. 2498

Petitioners' interpretation of Art. 76, if its full reach were accepted, not only would prevent servicemen from obtaining injunctions under any circumstances against pending court-martial proceedings. It also would preclude any collateral relief in Art. III courts, even if the court-martial lacked jurisdiction in the most traditional sense, unless the serviceman could satisfy the requirements of habeas corpus jurisdiction. As pointed out above, certain remedies alternative to habeas, particularly suits for backpay, historically have been available. Indeed, this availability was reiterated shortly before enactment of the Code. See *Shapiro* v. *United States*, 69 F. Supp. 205 (Ct. Cl. 1947). Yet nothing in Art. 76 distinguishes between habeas corpus and other remedies also consistent with well-established rules governing collateral attack. If Congress intended such a distinction, it selected singularly inapt language to express it.

Nor does the legislative history justify an interpretation of the language so at odds with its clear purport. As we have had occasion recently to repeat, "repeals by implication are disfavored," and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available. *Regional Railroad Reorganization Act Cases*, Slip Op. No. 74–165, *et al.*, at 27–30 (December 16, 1974). It is true, as petitioners urge, that the writ of habeas corpus occupies a position unique in our jurisprudence, the consequence of its historical importance as the ultimate safeguard against unjustifiable deprivations of liberty. We read the statements attending congressional consideration

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before a Subcommittee of the Committee on Armed Services of the House of Representatives, 81st Cong., 1st Sess., at 799 (1949). Senator Kefauver, in discussing Art. 76, stated that "Congress, through its enactment, did not, and could not, . . . intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters." 96 Cong. Rec. 1414.

as addressing the particular concern that Art. 76 not be taken as affecting the availability of habeas corpus, a concern of special significance because of the vital interests the writ protects and because it is the most common mode of collateral relief from court-martial convictions. But an affirmative intent to preclude all other forms of collateral relief, on whatever ground, cannot be inferred from these scattered statements in the legislative history. Restraint on liberty, although perhaps the most immediately onerous, is not the only serious consequence of a court-martial conviction. Such convictions may result, for example, in deprivation of pay and earned promotion, and even in discharge or dismissal from the service under conditions that can cause lasting, serious harm in civilian life.[25]

This is not to say, of course, that for every such consequence there is a remedy in Art. III courts. That depends on whether the relief is sought in an action otherwise within the court's subject-matter jurisdiction, on a ground that recognizes the distinction between direct and collateral attack, and in a form that the court is able with propriety to grant. See Part III, *infra*. We also emphasize that the grounds upon which military judgments may be impeached collaterally are not necessarily invariable. For example, grounds of impeachment cognizable in habeas proceedings may not be sufficient to warrant other forms of collateral relief. Lacking a clear statement of congressional intent one way or the other, the question whether a court-martial judgment properly may be deemed void—*i. e.*, without res judicata effect for purposes of the matter at hand—may turn on the nature of the alleged defect, and the gravity of the harm from which

[25] See *Augenblick* v. *United States*, 377 F. 2d 586, 592 (Ct. Cl. 1967), rev'd on other grounds, 393 U. S. 348 (1969); *Kauffman* v. *Secretary of the Air Force*, 135 U. S. App. D. C. 1, 415 F. 2d 991, 995, cert. denied, 396 U. S. 1013 (1969).

relief is sought. Moreover, both factors must be assessed in light of the deference that should be accorded the judgments of the carefully designed military justice system established by Congress.

But we are concerned here only with petitioners' broad jurisdictional argument, which we reject for the reasons stated above. We therefore reiterate the construction given the Art. 76 language in *Gusik* and accepted by other courts, including the Court of Military Appeals,[26] and accordingly hold that Art. 76 does not stand as a jurisdictional bar to Captain Councilman's suit.

III

Our holding that the District Court had subject matter jurisdiction, assuming the requisite jurisdictional amount,[27] does not carry with it the further conclusion that the District Court properly could reach the merits of Councilman's claim or enjoin the petitioners from proceeding with the impending court-martial. There remains the question of equitable jurisdiction, a question concerned not with whether the claim falls within the limited jurisdiction conferred on the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers.[28]

In support of his prayer for an injunction, Councilman claimed that he would incur "great and irreparable damage in that he [might] be deprived of his liberty without

[26] In *United States* v. *Frischholz*, 16 U. S. C. M. A. 150, 151, 36 C. M. R. 306 (1966), the Court of Military Appeals stated that Art. 76 "does not insulate a conviction from subsequent attack in an appropriate forum. At best it provides finality only as to interpretation of military law by this Court . . . . It has never been held to bar review of a court-martial, when fundamental questions of jurisdiction are involved."

[27] See n. 9, *supra*.

[28] 2 J. Moore, Federal Practice, ¶ 2.08, at 406 (2d ed. 1970).

due process of law. . . ." The presiding military judge had refused to dismiss the charges against Councilman, rejecting the argument that they were not service-connected and that therefore the court-martial lacked jurisdiction to act on them. Thus, when the District Court intervened, there was no question that Councilman would be tried. But whether he would be convicted was a matter entirely of conjecture.[29] And even if one supposed that Councilman's service-connection contention almost certainly would be rejected on any eventual military review, there was no reason to believe that his possible conviction inevitably would be affirmed.

It therefore appears that Councilman was "threatened with [no] injury other than that incidental to every criminal proceeding brought lawfully and in good faith." *Douglas* v. *City of Jeannette*, 319 U. S. 157, 164 (1943). Of course, there is inevitable injury—often of serious proportions—incident to any criminal prosecution. But when the federal equity power is sought to be invoked against state criminal prosecutions, this Court has held that "[c]ertain types of injury, in particular, the cost, anxiety and inconvenience of having to defend against a single criminal prosecution, [can] not by themselves be considered 'irreparable' in the special legal sense of that term." *Younger* v. *Harris*, 401 U. S. 37, 47 (1971). "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law." *Steffanelli* v. *Minard*, 342 U. S. 117, 120 (1951). This maxim of equitable jurisdiction originated as a corrollary to the general subordination of equitable to legal remedies, which in turn "may originally have grown out of circumstances peculiar to

[29] Indeed, it is doubtful that, if convicted, Councilman would be incarcerated pending review within the military system. See 10 U. S. C. § 871 (c).

the English judicial system . . . ." *Younger* v. *Harris*, *supra*, at 44.[30] The history is familiar enough. But ancient lineage, particularly if sprung from circumstances no longer existent, neither establishes the contemporary utility of a rule nor necessarily justifies the harm caused by delay in the vindication of individual rights.

As to state criminal prosecutions, such justification has been found to reside in the peculiarly compelling demands of federalism and the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law . . . ." *Steffanelli* v. *Minard*, *supra*. The precise content of constitutional rights almost invariably turns on the context of fact and law in which they arise. State courts are quite as capable as federal courts of determining the facts, and they alone can define and interpret state law. Equally important, under Art. VI of the Constitution, state courts share with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill. These considerations of comity, the necessity of respect for coordinate judicial systems, have led this Court to preclude equitable intervention into pending state criminal proceedings unless the harm sought to be averted is "both great and immediate," of a kind that "cannot be eliminated by . . . defense against a single criminal prosecution." *Fenner* v. *Boykin*, 271 U. S. 240, 243–244 (1926); *Younger* v. *Harris*, *supra*. See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). Precisely these considerations underlie the requirement that

[30] It has been suggested that the continuing subordination of equitable to legal remedies is justified "under our Constitution, in order to prevent erosion of the role of the jury and avoid a duplication of legal proceedings . . . ." *Younger* v. *Harris*, 401 U. S., at 45. See O. Fiss, Injunctions, at 12 (1972). Whatever relevance the first of these justifications has in the *Younger* context, it has none here.

petitioners seeking habeas relief from state criminal convictions must first exhaust available state remedies: the federal courts are "not at liberty . . . to presume that the decision of the State court would be otherwise than is required by the fundamental law of the land . . . ." *Ex parte Royall*, 117 U. S. 241, 252–253 (1886). See *Darr* v. *Burford*, 339 U. S. 200, 204 n. 10 (1950).

To some extent, the practical considerations supporting both the exhaustion requirement in habeas corpus and the federal equity rule barring intervention into pending state criminal proceedings except in extraordinary circumstances are similar to those that underlie the requirement of exhaustion of administrative remedies. *E. g., Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1948). The latter rule, looking to the special competence of agencies in which Congress has reposed the duty to perform particular tasks, is based on the need to allow agencies to develop the facts, to apply the law in which they are peculiarly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agency's ultimate decision will obviate the need for judicial intervention. *E. g., McKart* v. *United States*, 395 U. S. 185, 194–195, (1969), *Parisi* v. *Davidson*, 405 U. S. 34, 37 (1972).

These considerations apply in equal measure to the balance governing the propriety of equitable intervention into pending court-martial proceedings. But as in the case of state criminal prosecutions there is here something more that, in our view, counsels strongly against the exercise of equity power even where, under the administrative remedies exhaustion rule, intervention might be appropriate.[31] While the peculiar demands of federalism

[31] See *Levy* v. *Corcoran*, 128 U. S. App. D. C. 388, 389 F. 2d 929,

are not implicated, the deficiency is supplied by factors equally compelling. The military is "a specialized society separate from the civilian society—with laws and traditions of its own [developed] during its long history." *Parker* v. *Levy*, 417 U. S. 733, 743 (1974). Moreover, "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise," *Toth* v. *Quarles*, 350 U. S. 11, 17 (1955). To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress.

In enacting the Uniform Code, Congress attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted. As a result, Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges "completely removed from all military influence or persuasion," [32] who would gain over time thorough familiarity with military problems. See *Noyd* v. *Bond*, *supra*, at 694–695.

As we have stated above, judgments of the military court system remain subject in proper cases to collateral impeachment. But implicit in the congressional scheme

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931 (Opinion of Leventhal, J.), cert. denied, 389 U. S. 960 (1967). Cf. Sherman, Judicial Review of Military Determinations and the Exhaustion of Remedies Requirement, 55 Va L. Rev. 483, 496–499 (1969).

[32] H. R. Rep. No. 491, 81st Cong., 1st Sess., p. 7 (1949).

embodied in the Code is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen's constitutional rights. We have recognized this, as well as the practical considerations common to all exhaustion requirements, in holding that federal courts normally will not entertain habeas petitions by military prisoners unless all available military remedies have been exhausted. *Gusik* v. *Schilder, supra; Noyd* v. *Bond, supra.*[33] The same principles are relevant to striking the balance governing the exercise of equity power. We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention, by way of injunction or otherwise.

Respondent seeks to avoid this result by pointing to the several military habeas cases in which this Court has not required exhaustion of remedies in the military system before allowing collateral relief. *Toth* v. *Quarles*, 350 U. S. 11 (1955); *Reed* v. *Covert*, 354 U. S. 1 (1957); *McElroy* v. *Guagliardo*, 361 U. S. 281 (1960). In those cases, the habeas petitioners were *civilians* who contended that Congress had no constitutional power to subject them to the jurisdiction of courts-martial. The issue presented concerned not only the military court's jurisdiction, but whether under Art. I Congress could allow the military to interfere with the liberty of civilians even for the limited purpose of forcing them to answer to the military justice system. In each of these cases, the

[33] In *Gusik* v. *Schilder*, the Court drew an explicit analogy to the exhaustion requirement for federal habeas attacks on state criminal convictions. 340 U. S., at 131–132. See *Gosa* v. *Mayden*, 413 U. S. 665, 711–712 (1973) (MARSHALL, J., dissenting).

disruption caused to petitioners' civilian lives and the accompanying deprivation of liberty made it "especially unfair to require exhaustion . . . when the complainants raised substantial arguments denying the right of the military to try them at all." *Noyd* v. *Bond, supra,* at 696 n. 8. The constitutional question presented turned on the status of the persons as to whom the military asserted its power. As the Court noted in *Noyd,* it "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented." *Ibid.*[34]

Assuming *arguendo* that, absent incarceration or other deprivation of liberty, federal court intervention would be appropriate in cases like *Toth* and its progeny despite failure to exhaust military remedies, the considerations supporting such intervention are not applicable here. Councilman was on active duty when the charges against him were brought. There is no question that he is subject to military authority and in proper cases to disciplinary sanctions levied through the military justice system. We see no injustice in requiring respondent to submit to a system established by Congress and carefully designed to protect not only military interests but his legitimate interests as well. Of course, if the offenses with which he is charged are not "service-connected," the military courts will have had no power to impose any punishment whatever. But that issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often

[34] See *United States ex rel. Guagliardo* v. *McElroy,* 104 U. S. App. D. C. 112, 259 F. 2d 927, 929 (1958), aff'd, 361 U. S. 281 (1960).

will turn on the precise set of facts in which the offense has occurred. See *Relford* v. *United States Disciplinary Commandant*, *supra*. More importantly, they are matters as to which the expertise of military courts is singularly relevant, and their judgments indispensable to inform any eventual review in Art. III courts.[35]

[35] *Dooley* v. *Ploger*, 491 F. 2d 608, 612–615 (CA4 1974); *Sedivy* v. *Richardson*, 485 F. 2d 1115, 1118–1121 (CA3 1973). See Nelson & Westbrook, Court-Martial Jurisdiction over Service Connected Offenses: An Analysis of *O'Callahan* v. *Parker*, 54 Minn. L. Rev. 1, 50–52 (1969).

The dissenting opinion of MR. JUSTICE BRENNAN states that "[m]ilitary tribunals have no expertise whatever to bring to bear on the determination whether a common everyday practice carried on by civilians becomes service connected when carried on by servicemen." *Post*, at 4. Moreover, the dissent finds the record devoid of evidence "that use of marijuana in any amounts under any circumstances adversely affects the serviceman's performance of his duties." *Post*, at 8.

Although we do not address factual issues in this opinion, we note—in view of the dissent's position—the Solicitor General's statement that "drug abuse is a far more serious problem in the military context than in civilian life." Petitioners' Brief, at 15. The seriousness of the problem is indicated by information presented before congressional committees to the effect that some 86,000 servicemen underwent some type of rehabilitation for drug abuse in fiscal years 1972 and 1973, and only 52% of these were able to return to duty after rehabilitation. Petitioner's Brief, at 18, citing Hearing before the Subcommittee on Drug Abuse in the Military Services of the Senate Committee on Armed Services, on Review of Military Drug and Alcohol Programs, 93d Cong., 1st Sess., at 109, 110. See also Hearings before the Subcommittee on Alcoholism and Narcotics of the Senate Committee on Labor and Public Welfare, on Military Drug Abuse 1971, 92d Cong., 1st Sess., at 120–127. It is not surprising, in view of the nature and magnitude of the problem, that in *United States* v. *Beeker*, 18 U. S. C. M. A. 563, 565, 40 C. M. R. 275, 277 (1969), the Court of Military Appeals found that "use of marijuana and narcotics by military persons on or off a military base has special military significance in light of the disastrous effects"

We have no occasion to attempt to define those circumstances, if any, in which equitable intervention into pending court-martial proceedings might be justified. In the circumstances disclosed here, we discern nothing that outweighs the strong considerations favoring exhaustion of remedies or that warrants intruding on the integrity of military court processes.

Reversed.

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment because I believe that Art. 76 of the U. C. M. J. applies only to post-judgment attacks upon the proceedings of courts-martial and that the District Court should have dismissed the complaint on the basis of *Younger* v. *Harris*, 401 U. S. 37 (1971).

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of these substances "on the health, morale and fitness for duty of persons in the Armed Forces."

We express no opinion whether the offense with which respondent in this case was charged is in fact service connected. But we have no doubt that military tribunals *do* have both experience and expertise that qualify them to determine the facts and to evaluate their relevance to military discipline, morale, and fitness.

SUPREME COURT OF THE UNITED STATES

No. 73–662

James R. Schlesinger et al., Petitioners, *v.* Bruce R. Councilman.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[March 25, 1975]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring and dissenting.

I agree that Art. 76 of the Uniform Code of Military Justice, 10 U. S. C. § 876, does not limit the jurisdiction of federal civil courts to habeas corpus review of court-martial convictions. I therefore join Part II of the Court's opinion.

I dissent, however, from the Court's holding in Part III that, as applied to his challenge that the offense charged was not service connected, this serviceman must exhaust every avenue within the military for determination and review of that question, and that, until he does, "federal district courts must refrain from intervention, by injunction or otherwise." The Court imposes this restraint upon the exercise by the District Court of its conceded jurisdiction for reasons that clearly are not persuasive. Moreover, today's holding departs from an unbroken line of our decisions that—consistently with our basic constitutional tenet that subordinates the military to the civil authority—restricts military cognizance of offenses to the narrowest jurisdiction deemed absolutely necessary, and precludes expansion of military jurisdiction at the expense of the constitutionally preferred civil jurisdiction. *Toth* v. *Quarles*, 350 U. S. 11 (1955); *Reid* v. *Covert*, 354 U. S. 1 (1957); *McElroy* v. *Guagliardo*, 361 U. S. 281 (1960); *Noyd* v. *Bond*, 395 U. S. 683 (1969).

I

It is of course settled that federal district courts may not entertain even a habeas corpus application of a serviceman convicted of offenses raising no question of service connection until the serviceman has exhausted all available military remedies, *Noyd* v. *Bond, supra.* But our opinion in *Noyd* carefully distinguished situations presenting challenges to the jurisdiction of the military over the persons charged, *e. g., Toth* v. *Quarles, supra, Reid* v. *Covert, supra, McElroy* v. *Guagliardo, supra.* We noted that in each of those cases the Court "vindicated complainants' claims without requiring exhaustion of military remedies," and that "[w]e did so . . . because we did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented. Moreover, it appeared especially unfair to require exhaustion of military remedies when the complainants raised substantial arguments denying the right of the military to try them at all." 395 U. S., *supra,* at 696 n. 8.

That statement precisely fits the situation presented by this case. The respondent serviceman raises "substantial arguments denying the right of the military to try [him] at all," and the Court utterly fails to suggest any special "expertise of military courts," including the Court of Military Appeals, that even approximates the far greater expertise of civil courts in the determination of constitutional questions of jurisdiction. Thus there is compelled here the conclusion in favor of civil court cognizance without prior exhaustion of military remedies that was reached in *Toth* v. *Quarles, Reid* v. *Covert,* and *McElroy* v. *Guagliardo.*

The Court provides no reasoned justification for its departure from these holdings in requiring exhaustion in

this case.[1] The Court's failure is not surprising since plainly there is wholly lacking in military tribunals the qualification ordinarily relied on to justify the exhaustion requirement, namely, the know-how or "expertise" of an agency particularly knowledgeable in the determination of the same or like questions. Military tribunals simply have no special, if any, expertise in the determination whether the offense charged to respondent was service connected.[2] Civil courts may properly defer to military tribunals when cases involve "extremely technical provisions of the Uniform Code," *Noyd* v. *Bond, supra,* at 696, or where deference may avoid unnecessary friction because the serviceman may well prevail before the military authorities. But this case presents neither situation.

The offense charged here is not enmeshed in "technical provisions of the Uniform Code." On the contrary, it is a common everyday type of drug offense that federal courts encounter all over the country every day. The Court agrees that a drug transaction is not a service-connected offense merely because the participants are servicemen. Rather, the Court analogizes military tri-

[1] The Court would distinguish *Toth*, *Reid*, and *McElroy* on the ground that civilians, not servicemen, challenged the military's jurisdiction. But *Noyd* v. *Bond* did not rely on that fact. Rather, we focused on the lack of expertise of military courts-martial to deal with federal jurisdictional and constitutional issues. ("[W]e did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented." 395 U. S., *supra*, at 696 n. 8.)

[2] The Court's reliance upon decisions restraining federal court intervention in state criminal proceedings is misplaced. *Ante*, at 16–18. Those decisions invoke considerations of comity, equity, and general principles of "Our Federalism" which counsel against interference by the federal judicial system with proceedings pending in a state judicial system having like competence to decide federal constitutional questions. Military tribunals plainly lack a comparable competence.

bunals to administrative agencies and imposes the exhaustion requirement familiar in agency cases—and it does so even though the question presented is a constitutional determination whether the military has any jurisdiction to try the serviceman at all. The mere suggestion of such an analogy is well nigh incredible. Military tribunals have no expertise whatever to bring to bear on the determination whether a common everyday practice carried on by civilians becomes service connected when carried on by servicemen.[3] It is virtually hornbook law that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *O'Callahan* v. *Parker*, 395 U. S. 258, 265 (1969). For "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *Id.*, at 262. Dealing with the "nice subtleties of constitutional law" is however a, if not *the*, primary business of civil federal judges. It baffles me therefore how the Court can conclude that courts-martial or other military tribunals can be assigned on grounds of expertise, in preference to civil federal judges, the responsibility for constitutional decisionmaking.

[3] The Court pays deserved respect to the fairness of the military justice system, observing that one of its "critical element[s] . . . is the Court of Military Appeals consisting of civilian judges 'completely removed from all military influence or persuasion,' who would gain over time thorough familiarity with military problems," *ante*, at 19, and adding "the view that the military court system generally is adequate to and responsibily will perform its assigned task." *Ante*, at 20. I agree, but "thorough familiarity with military problems" is not "thorough familiarity" with constitutional problems of jurisdiction. The problem presented by this case is not a traditional "military problem." It is a constitutional question whether the military has any jurisdiction whatever to try respondent for the offense charged. That is the type of question rarely confronted by the Court of Military Appeals and certainly even more rarely by other military tribunals, often composed of other servicemen, and, at least in the case of courts-martial, convened only for a single case.

The Court's grounding of its requirement of deference to the military on the notion that respondent may prevail on his claim that the offense was not service connected is equally baffling. The Government concedes that "the holdings of the Court of Military Appeals with regard to the 'service connection' of various kinds of drug offenses suggest that such a challenge to court-martial jurisdiction would probably have been unsuccessful." Brief on Jurisdictional Issues, at 19. A cursory survey of decisions of the Court of Military Appeals suggests that the Government might well have made a more positive concession. See *United States* v. *Rose*, 19 U. S. C. M. A. 3, 41 C. M. R. 28 (1969); *United States* v. *Beeker*, 18 U. S. C. M. A. 563, 40 C. M. R. 275 (1969); *United States* v. *Teasley*, 22 U. S. C. M. A. 131, 46 C. M. R. 111 (1973). One of the latest is *United States* v. *Sexton*, 23 U. S. C. M. A. 101, 48 C. M. R. 662 (1974), which held that off-post sales and transfers of marihuana, as in this case, by a serviceman to an undercover serviceman agent was service connected. That track record of the Court of Military Appeals clearly compels the conclusion that where "the highest court available under the Uniform Code of Military Justice has consistently upheld jurisdiction over persons in the same legal posture as [respondent, he] should not be required to await a similar decision in his case." *Guagliardo* v. *McElroy*, 259 F. 2d 927, 929, n. 4 (D. C. Cir. 1958), aff'd, 361 U. S. 281 (1960).

I would conclude, therefore, that the Court of Appeals properly affirmed the action of the District Court in refusing to defer to the military, and in deciding the jurisdictional question of service connection. In that circumstance, I reach the merits. I conclude that the offense was not service connected and would affirm the Court of Appeals' affirmance of the District Court's injunction against respondent's court-martial.

II

In *Relford* v. *United States Disciplinary Commandant*, 401 U. S. 355, 365 (1971), this Court identified 12 factors that *O'Callahan* v. *Parker*, *supra*, held should be weighed in determining whether an offense is service connected:

"1. The serviceman's proper absence from the base.

"2. The crime's commission away from the base.

"3. Its commission at a place not under military control.

"4. Its commission within our territorial limits and not in an occupied zone of a foreign country.

"5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

"6. The absence of any connection between the defendant's military duties and the crime.

"7. The victim's not being engaged in the performance of any duty relating to the military.

"8. The presence and availability of a civilian court in which the case can be prosecuted.

"9. The absence of any flouting of military authority.

"10. The absence of any threat to a military post.

"11. The absence of any violation of military property.

"12. The offense's being among those traditionally prosecuted in civilian courts." 401 U. S., *supra*, at 365.

None of these factors establishes service-connection in this case. Respondent was properly absent from the post; the offense occurred in respondent's off-post apartment, while he was off duty; it was committed in the United States in peacetime; there was no connection between respondent's military duties and the crime; the offense is one which is prosecuted regularly in civilian

courts, and these courts were available; and there was no threat to the security of the post or its property, or any flouting of military authority.

It is true that the undercover serviceman was performing a duty assigned to him by his military superiors. But this does not establish factor 7, for the Government candidly admits that "Skaggs, was in fact an undercover agent and hence not a 'victim' any more than in a civilian prosecution it would matter that a drug sale was made to a plainclothes policeman who did not intend to use the drug." Government's Brief on the Merits, at 5. See also *Schroth* v. *Warner*, 353 F. Supp. 1032, 1044 (Haw. 1973), holding that a military undercover agent "is not performing a function which has any special military significance."

But the Government urges that military significance is present in "the bearing of the offense in question on the discipline, morale, and effectiveness of fighting forces." Government's Brief on the Merits, at 4, and that this suffices to establish, for two reasons, that the offense is service connected. First, respondent, an officer, knew that he was dealing with an enlisted man, and that "in the tightly-knit, rumor-prone society of the military, word will usually circulate among the enlisted ranks concerning an officer's participation in such unlawfulness," causing a breakdown in military discipline, effectiveness, and morale. Second, "possession of marijuana and other proscribed drugs, whether off base or on," tends to impair the effectiveness of the Armed Forces.[4]

[4] The Government's arguments were effectively rejected only six years ago in *O'Callahan, supra*. There, the Government argued that because *Toth*, *Reid*, and *McElroy* all concluded that courts-martial were without jurisdiction to try nonmilitary personnel "no matter how intimate the connection between their offense and the concerns of military discipline," it follows "that once it is established that the accused is a member of the Armed Forces, lack of relationship

Neither reason is supported by the record. Respondent was stationed at Fort Sill and the offense occurred in the civilian community of Lawton, Oklahoma, while respondent was off duty, and out of uniform. The Government introduced no evidence that respondent's actions in any way impaired or threatened to impair the discipline and effectiveness of military personnel at Fort Sill. Similarly, and related, the record is devoid of any evidence whatever that use of marihuana in any amounts under any circumstances adversely affects a serviceman's performance of his duties. Whatever might be the judgment of medical, psychological, and sociological research in these particulars, none was introduced in this record.

I would affirm.

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between the offense and identifiable military interests is irrelevant to the jurisdiction of a court-martial." 395 U. S., *supra*, at 267. We held that although military status is essential to court-martial jurisdiction, "it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." *Ibid.*